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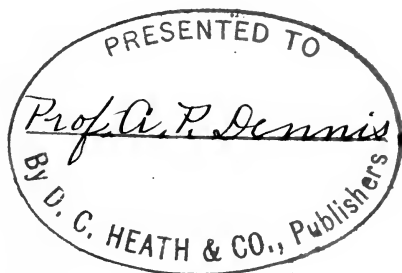
THE CONSTITUTION  
OF  
THE UNITED STATES

AT THE END OF

THE FIRST CENTURY

BY

GEORGE S. BOUTWELL



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TO THE  
AUTHOR

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## PREFACE.

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It has been my purpose, in the preparation of this volume, to set forth in a concise form the substance of the leading decisions of the Supreme Court, in which the several articles, sections, and clauses of the Constitution of the United States have been examined, explained, and interpreted.

The inquiry covers the full period of a hundred years. In that time the more important, and the most important, provisions of that instrument have been discussed at the bar, and the questions arising from business transactions, from the relations of States to each other, from the relations of States to the national government, and questions growing out of our treaties with Indian tribes and with foreign nations, have been adjudicated by the Court.

An examination of the authorities so created justifies and renders unavoidable the conclusion that the Constitution of the United States, in its principles and in its main features, is no longer the subject of controversy, of debate, or of doubt.

The line of sovereignty in the States and the nature, extent, and limits of the sovereignty of the national government have been distinctly marked; and thus the gravest questions that have arisen under the Constitution — questions that disturbed the harmony and threatened the existence of the Union — have passed from the field of debate into the realm of settled law.

It is a fortunate circumstance in the history of the Supreme Court and of the country that the conclusions were not reached by the concurrent action of judges taken from one section of the Union, nor by the concurrent action of

judges who had entertained kindred opinions in partisan warfare. Indeed, as the text will show, the crucial and most important case — the case which recognized and established the supremacy of the national government — was decided in a divided court, upon the opinion of judges, a majority of whom were from the section of the Union where the extreme doctrine of State rights was accepted generally.

The supremacy of the national government has been established, but within limits well defined; while to the States every power, all dignity, all sovereignty essential for the administration of governments within States, remain undisturbed.

At the end of a century this result has been reached: The action of the general government is applied to all the external concerns of the nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the national government.

I have not sought to adapt this work to any class of readers, either student or professional, but to present the Constitution of the United States to whatever public I may be able to reach, and as it has been interpreted by the Supreme Court.

At the close of my self-imposed task, which from the beginning to the end has been instructive and agreeable to me, I cannot omit the expression of my reverent admiration for the foreseeing genius of the men who created the Supreme Court, made it independent in its organization, infallible as an instrument of government, and the final arbiter in the determination of the rights of citizens and of controversies between States.

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# THE DECLARATION OF INDEPENDENCE.

1776.<sup>1</sup>

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IN CONGRESS, JULY 4, 1776.

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*The unanimous Declaration of the thirteen united States of America.*

WHEN in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the

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<sup>1</sup> The delegates of the United Colonies of New Hampshire; Massachusetts Bay; Rhode Island and Providence Plantations; Connecticut; New York; New Jersey; Pennsylvania; New Castle, Kent, and Sussex, in Delaware; Maryland; Virginia; North Carolina, and South Carolina, In Congress assembled at Philadelphia, *Resolved* on the 10th of May, 1776, to recommend to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs had been established, to adopt such a government as should, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and of America in general. A preamble to this resolution, agreed to on the 15th of May, stated the intention to be totally to suppress the exercise of every kind of authority under the British crown. On the 7th of June, certain resolutions respecting independency were moved and seconded. On the 10th of June it was resolved, that a committee should be appointed to prepare a declaration to the following effect: "That the United Colonies are, and of right ought to be, free and independent States; that they are absolved from all allegiance to the British crown; and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved." On the preceding day it was determined that the Committee for preparing the declaration should consist of five, and they were chosen accordingly, in the following order: Mr. Jefferson, Mr. J. Adams, Mr. Franklin, Mr. Sherman, Mr. R. R. Livingston. On the 11th of June a resolution was passed to appoint a commit-

Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they

tee to prepare and digest the form of a confederation to be entered into between the colonies, and another committee to prepare a plan of treaties to be proposed to foreign powers. On the 12th of June, it was resolved, that a committee of Congress should be appointed by the name of a board of war and ordinance, to consist of five members. On the 25th of June, a declaration of the deputies of Pennsylvania, met in provincial conference, expressing their willingness to concur in a vote declaring the United Colonies free and independent States, was laid before Congress and read. On the 28th of June, the committee appointed to prepare a declaration of independence brought in a draught, which was read, and ordered to lie on the table. On the 1st of July, a resolution of the convention of Maryland, passed the 28th of June, authorizing the deputies of that colony to concur in declaring the United Colonies free and independent States, was laid before Congress and read. On the same day Congress resolved itself into a committee of the whole, to take into consideration the resolution respecting independency. On the 2d of July, a resolution declaring the colonies free and independent States, was adopted. A declaration to that effect was, on the same and following days, taken into further consideration. Finally, on the 4th of July, the Declaration of Independence was agreed to, engrossed on paper, signed by John Hancock as president, and directed to be sent to the several assemblies, conventions, and committees, or councils of safety, and to the several commanding officers of the continental troops, and to be proclaimed in each of the United States, and at the head of the Army. It was also ordered to be entered upon the Journals of Congress, and on the 2d of August, a copy engrossed on parchment was signed by all but one of the fifty-six signers whose names are appended to it. That one was Matthew Thornton, of New Hampshire, who on taking his seat in November asked and obtained the privilege of signing it. Several who signed it on the 2d of August were absent when it was adopted on the 4th of July, but, approving of it, they thus signified their approbation.

NOTE. — The proof of this document, as published above, was read by Mr. Ferdinand Jefferson, the Keeper of the Rolls at the Department of State, at Washington, who compared it with the fac-simile of the original in his custody. He says: "In the fac-simile, as in the original, the whole instrument runs on without a break, but dashes are mostly inserted. I have, in this copy, followed the arrangement of paragraphs adopted in the publication of the Declaration in the newspaper of John Dunlap, and as printed by him for the Congress, which printed copy is inserted in the original Journal of the old Congress. The same paragraphs are also made by the author, in the original draught preserved in the Department of State."

should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. — Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our People, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislature.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a jurisdic-

tion foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended Legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences:

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Government:

For suspending our own Legislature, and declaring themselves invested with Power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People.

Nor have We been wanting in attention to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of



right do. And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

JOHN HANCOCK.

*New Hampshire.*

JOSIAH BARTLETT,  
WM. WHIPPLE,

MATTHEW THORNTON.

*Massachusetts Bay.*

SAML. ADAMS,  
JOHN ADAMS,

ROBT. TREAT PAINE,  
ELBRIDGE GERRY.

*Rhode Island.*

STEP. HOPKINS,

WILLIAM ELLERY.

*Connecticut.*

ROGER SHERMAN,  
SAM'EL HUNTINGTON,

WM. WILLIAMS,  
OLIVER WOLCOTT.

*New York.*

WM. FLOYD,  
PHIL. LIVINGSTON,

FRANS. LEWIS,  
LEWIS MORRIS.

*New Jersey.*

RICHD. STOCKTON,  
JNO. WITHERSPOON,  
FRAS. HOPKINSON,

JOHN HART,  
ABRA. CLARK.

*Pennsylvania.*

ROBT. MORRIS,  
BENJAMIN RUSH,  
BENJA. FRANKLIN,  
JOHN MORTON,  
GEO. CLYMER,

JAS. SMITH,  
GEO. TAYLOR,  
JAMES WILSON,  
GEO. ROSS.

*Delaware.*

CÆSAR RODNEY,  
GEO. READ,

THO. M'KEAN.

*Maryland.*

SAMUEL CHASE,  
WM. PACA,  
THOS. STONE,

CHARLES CARROLL of Carroll-  
ton.

*Virginia.*

GEORGE WYTHE,  
RICHARD HENRY LEE,  
TH. JEFFERSON,  
BENJA. HARRISON,

THOS. NELSON, jr.,  
FRANCIS LIGHTFOOT LEE,  
CARTER BRAXTON.

*North Carolina.*

WM. HOOPER,  
JOSEPH HEWES,

JOHN PENN.

*South Carolina.*

EDWARD RUTLEDGE,  
THOS. HEYWARD, Junr.,

THOMAS LYNCH, Junr.,  
ARTHUR MIDDLETON.

*Georgia.*

BUTTON GWINNETT,  
LYMAN HALL,

GEO. WALTON.

NOTE. — Mr. Ferdinand Jefferson, Keeper of the Rolls in the Department of State, at Washington, says: "The names of the signers are spelt above as in the fac-simile of the original, but the punctuation of them is not always the same; neither do the names of the States appear in the fac-simile of the original. The names of the signers of each State are grouped together in the fac-simile of the original, except the name of Matthew Thornton, which follows that of Oliver Wolcott."

# ARTICLES OF CONFEDERATION.

1777.<sup>1</sup>

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*To all to whom these Presents shall come, we the undersigned  
Delegates of the States affixed to our Names send greeting.*

Whereas the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of our Lord One Thousand Seven Hundred and Seventyseven, and in the Second Year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Mas-

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<sup>1</sup> Congress *Resolved*, on the 11th of June, 1776, that a committee should be appointed to prepare and digest the form of a confederation to be entered into between the Colonies ; and on the day following, after it had been determined that the committee should consist of a member from each Colony, the following persons were appointed to perform that duty, to wit: Mr. Bartlett, Mr. S. Adams, Mr. Hopkins, Mr. Sherman, Mr. R. R. Livingston, Mr. Dickinson, Mr. M'Kean, Mr. Stone, Mr. Nelson, Mr. Hewes, Mr. E. Rutledge, and Mr. Gwinnett. Upon the report of this committee, the subject was, from time to time, debated, until the 15th of November, 1777, when a copy of the confederation being made out, and sundry amendments made in the diction, without altering the sense, the same was finally agreed to. Congress, at the same time, directed that the articles should be proposed to the legislatures of all the United States, to be considered, and if approved of by them, they were advised to authorize their delegates to ratify the same in the Congress of the United States ; which being done, the same should become conclusive. Three hundred copies of the Articles of Confederation were ordered to be printed for the use of Congress ; and on the 17th of November, the form of a circular letter to accompany them was brought in by a committee appointed to prepare it, and being agreed to, thirteen copies of it were ordered to be made out, to be signed by the president and forwarded to the several States, with copies of the confederation. On the 29th of November ensuing, a committee of three was appointed, to procure a translation of the articles to be made into the French language, and to report

sachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia in the Words following, viz.

*“Articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.*

ARTICLE I. The stile of this confederacy shall be “The United States of America.”

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an address to the inhabitants of Canada, &c. On the 26th of June, 1778, the form of a ratification of the Articles of Confederation was adopted, and, it having been engrossed on parchment, it was signed on the 9th of July on the part and in behalf of their respective States, by the delegates of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, Pennsylvania, Virginia, and South Carolina, agreeably to the powers vested in them. The delegates of North Carolina signed on the 21st of July, those of Georgia on the 24th of July, and those of New Jersey on the 26th of November following. On the 5th of May, 1779, Mr. Dickinson and Mr. Van Dyke signed in behalf of the State of Delaware, Mr. M’Kean having previously signed in February, at which time he produced a power to that effect. Maryland did not ratify until the year 1781. She had instructed her delegates, on the 15th of December, 1778, not to agree to the confederation until matters respecting the western lands should be settled on principles of equity and sound policy ; but, on the 30th of January, 1781, finding that the enemies of the country took advantage of the circumstance to disseminate opinions of an ultimate dissolution of the Union, the legislature of the State passed an act to empower their delegates to subscribe and ratify the articles, which was accordingly done by Mr. Hanson and Mr. Carroll, on the 1st of March of that year, which completed the ratification of the act ; and Congress assembled on the 2d of March under the new powers.

NOTE. — The proof of this document, as published above, was read by Mr. Ferdinand Jefferson, the Keeper of the Rolls of the Department of State, at Washington, who compared it with the original in his custody. He says : “ The initial letters of many of the words in the original of this instrument are capitals, but as no system appears to have been observed, the same words sometimes beginning with a capital and sometimes with a small letter, I have thought it best not to undertake to follow the original in this particular. Moreover, there are three forms of the letter s : the capital S, the small s, and the long f, the last being used indiscriminately to words that should begin with a capital and those that should begin with a small s.”

ARTICLE II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

*Dred Scott v. Sanford*, 19 How., 393 ; *Texas v. White*, 7 Wall., 725.

ARTICLE III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States ; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant ; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given in each of these States

to the records, acts and judicial proceedings of the courts and magistrates of every other State.

ARTICLE V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

ARTICLE VI.<sup>1</sup> No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in

<sup>1</sup> Wharton v. Wise, 153 U. S., 155.

Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted: nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or State and the subjects thereof, against which

war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ARTICLE VII. When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ARTICLE VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

ARTICLE IX. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article — of sending and receiving ambassadors — entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever — of



establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party

shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:" provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdiction as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States.—fixing the standard of weights

and measures throughout the United States. — regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated — establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office — appointing all officers of the land forces, in the service of the United States, excepting regimental officers — appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States — making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated “a Committee of the States,” and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction — to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses — to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted, — to build and equip a navy — to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the United

States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such

parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

ARTICLE X. The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.

ARTICLE XI. Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

ARTICLE XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

ARTICLE XIII. Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Con-

gress of the United States, and be afterwards confirmed by the Legislatures of every State.

And whereas it has pleased the Great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the States we re[s]pectively represent, and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the independence of America.\*

*On the part & behalf of the State of New Hampshire.*

JOSIAH BARTLETT,

JOHN WENTWORTH, Junr.,  
August 8th, 1778.

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\* From the circumstance of delegates from the same State having signed the Articles of Confederation at different times, as appears by the dates, it is probable they affixed their names as they happened to be present in Congress, after they had been authorized by their constituents.

*On the part and behalf of the State of Massachusetts Bay.*

JOHN HANCOCK,  
SAMUEL ADAMS,  
ELDBRIDGE GERRY,

FRANCIS DANA,  
JAMES LOVELL,  
SAMUEL HOLTEN.

*On the part and behalf of the State of Rhode Island and Providence Plantations.*

WILLIAM ELLERY,  
HENRY MARCHANT,

JOHN COLLINS.

*On the part and behalf of the State of Connecticut.*

ROGER SHERMAN,  
SAMUEL HUNTINGTON,  
OLIVER WOLCOTT,

TITUS HOSMER,  
ANDREW ADAMS.

*On the part and behalf of the State of New York.*

JAS. DUANE,  
FRA. LEWIS,

WM. DUER,  
GOUV. MORRIS.

*On the part and in behalf of the State of New Jersey, Novr. 26, 1778.*

JNO. WITHERSPOON,

NATHL. SCUDDER.

*On the part and behalf of the State of Pennsylvania.*

ROBT. MORRIS,  
DANIEL ROBERDEAU,  
JONA. BAYARD SMITH,

WILLIAM CLINGAN,  
JOSEPH REED, 22d July, 1778.

*On the part & behalf of the State of Delaware.*

THO. M'KEAN, Feby. 12, 1779. NICHOLAS VAN DYKE.  
JOHN DICKINSON, May 5th,  
1779.

*On the part and behalf of the State of Maryland.*

JOHN HANSON, March 1, 1781. DANIEL CARROLL, Mar. 1, 1781.

*On the part and behalf of the State of Virginia.*

RICHARD HENRY LEE,  
JOHN BANISTER,  
THOMAS ADAMS,

JNO. HARVIE,  
FRANCIS LIGHTFOOT LEE.

*On the part and behalf of the State of No. Carolina.*

JOHN PENN, July 21st, 1778.      JNO. WILLIAMS.  
CORN. HARNETT,

*On the part & behalf of the State of South Carolina.*

HENRY LAURENS,  
WILLIAM HENRY DRAYTON,  
JNO. MATHEWS,

RICH. HUTSON,  
THOS. HEYWARD, Junr.

*On the part & behalf of the State of Georgia.*

JNO. WALTON, 24th July, 1778.      EDWD. LANGWORTHY.  
EDWD. TELFAIR,



# THE NORTHWEST TERRITORIAL GOVERNMENT.

1787.

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[THE CONFEDERATE CONGRESS, JULY 13, 1787.]

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*An Ordinance for the government of the territory of the United States northwest of the river Ohio.*

SECTION 1. *Be it ordained by the United States in Congress assembled*, That the said territory, for the purpose of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

SEC. 2. *Be it ordained by the authority aforesaid*, That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among, their children and the descendants of a deceased child in equal parts, the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate; and this law relative

to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be, (being of full age,) and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers, shall be appointed for that purpose; and personal property may be transferred by delivery, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

SEC. 3. *Be it ordained by the authority aforesaid,* That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

SEC. 4. There shall be appointed from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and

proceedings every six months to the Secretary of Congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction, and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

SEC. 5. The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

SEC. 6. The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

SEC. 7. Previous to the organization of the general assembly the governor shall appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

SEC. 8. For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may

require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

SEC. 9. So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly: *Provided*, That for every five hundred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: *Provided*, That no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee-simple, two hundred acres of land within the same: *Provided also*, That a freehold in fifty acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

SEC. 10. The representatives thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

SEC. 11. The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner

removed by Congress; any three of whom to be a quorum; and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, resident in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress, five of whom Congress shall appoint and commission to serve aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress, one of whom Congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and the house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

SEC. 12. The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office; the governor before the President of Congress, and all other officers before the governor. As soon as a legis-

lature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary government.

SEC. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

SEC. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

## ARTICLE I.

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territories.

## ARTICLE II.

The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be

moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, — for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed.

### ARTICLE III.

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

### ARTICLE IV.

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted, or

to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona-fide* purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Huse v. Glover, 119 U. S., 543.

## ARTICLE V.

There shall be formed in the said territory not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western State, in the said territory, shall be bounded by the Mississippi, the Ohio, and the Wabash Rivers; a direct line drawn from the Wabash and Post Vincents, due north, to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle



State shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last-mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: *Provided, however,* And it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided,* The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles, and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

## ARTICLE VI.

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: *Provided always,* That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully re-claimed, and conveyed to the person claiming his or her labor or service as aforesaid.

*Be it ordained by the authority aforesaid,* That the resolutions of the 23d of April, 1784, relative to the subject of this ordinance, be, and the same are hereby, repealed, and declared null and void.

Done by the United States, in Congress assembled, the 13th day of July, in the year of our Lord 1787, and of their sovereignty and independence the twelfth.

Wallace *v.* Parker, 6 Pet., 680; Pollard's Lessee *v.* Hogan, 3 How., 212; Jones *v.* Van Zandt, 5 How., 215; Strader et al. *v.* Graham, 10 How., 82; Pennsylvania *v.* Wheeling Bridge Company, 18 How., 421; Bates *v.* Brown, 5 Wall., 710; Messenger *v.* Mason, 10 Wall., 507; Clinton et al. *v.* Englebrecht, 13 Wall., 434; Langdean *v.* Hanes, 21 Wall., 521; Morton *v.* Nebraska, 21 Wall., 660.

# CONSTITUTION OF THE UNITED STATES.

1787.\*

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WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

*Chisholm v. Georgia*, 2 Dall., 419; *McCulloch v. State of Maryland*, 4 Wh., 316; *Brown v. Maryland*, 12 Wh., 419; *Barron v. The Mayor and City Council of Baltimore*, 7 Pet., 243; *Lane County v. Oregon*, 7 Wall., 71; *Texas v. White et al.*, 7 Wall., 700; *Van Bracklin v. Tennessee*, 117 U. S., 151; *Chinese Exclusion Case*, 130 U. S., 581.

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\* In May, 1785, a committee of Congress made a report recommending an alteration in the Articles of Confederation, but no action was taken on it, and it was left to the State Legislatures to proceed in the matter. In January, 1786, the Legislature of Virginia passed a resolution providing for the appointment of five commissioners, who, or any three of them, should meet such commissioners as might be appointed in the other States of the Union, at a time and place to be agreed upon, to take into consideration the trade of the United States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act, relative to this great object, as, when ratified by them, will enable the United States in Congress effectually to provide for the same. The Virginia commissioners, after some correspondence, fixed the first Monday in September as the time, and the city of Annapolis as the place for the meeting, but only four other States were represented, viz.: Delaware, New York, New Jersey, and Pennsylvania; the commissioners appointed by Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Under the circumstances of so partial a representation, the commissioners present agreed upon a report, (drawn by Mr. Hamilton, of New York,) expressing their unanimous conviction that it might essentially tend to advance the

## ARTICLE I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Hayburn's Case (notes), 2 Dall., 409; *United States v. Texas*, 143 U. S., 621; *Field v. Clark*, 143 U. S., 649; *Fong Yue Ting v. The United States*, 149 U. S., 698.

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interests of the Union if the States by which they were respectively delegated would concur, and use their endeavors to procure the concurrence of the other States, in the appointment of commissioners to meet at Philadelphia on the second Monday of May following, to take into consideration the situation of the United States; to devise such further provisions as should appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled as, when agreed to by them and afterwards confirmed by the Legislatures of every State, would effectually provide for the same.

Congress, on the 21st of February, 1787, adopted a resolution in favor of a convention, and the Legislatures of those States which had not already done so (with the exception of Rhode Island) promptly appointed delegates. On the 25th of May, seven States having convened, George Washington, of Virginia, was unanimously elected President, and the consideration of the proposed constitution was commenced. On the 17th of September, 1787, the Constitution as engrossed and agreed upon was signed by all the members present, except Mr. Gerry, of Massachusetts, and Messrs. Mason and Randolph of Virginia. The president of the convention transmitted it to Congress, with a resolution stating how the proposed Federal Government should be put in operation, and an explanatory letter. Congress, on the 28th of September, 1787, directed the Constitution so framed, with the resolutions, and letter concerning the same, to "be transmitted to the several Legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the convention."

On the 4th of March, 1789, the day which had been fixed for commencing the operations of Government under the new Constitution, it had been ratified by the conventions chosen in each State to consider it, as follows: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; and New York, July 26, 1788.

The President informed Congress, on the 28th of January, 1790, that

SECTION. 2. <sup>1</sup> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

<sup>2</sup> No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

<sup>3</sup> \* [Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

*Veazie Bank v. Fenno*, 8 Wall., 533 ; *Scholey v. Rew*, 23 Wall., 331.

South Carolina had ratified the Constitution November 21, 1789 ; and he informed Congress on the 1st of June, 1790, that Rhode Island had ratified the Constitution May 29, 1789. Vermont, in convention, ratified the Constitution January 10, 1789, and was, by an act of Congress approved February 19, 1791, "received and admitted into this Union as a new and entire member of the United States."

\* The clause included in brackets is amended by the 14th amendment, 2d section.

<sup>4</sup> When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

<sup>5</sup> The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. <sup>1</sup> The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

<sup>2</sup> Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

<sup>3</sup> No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

<sup>4</sup> The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

<sup>5</sup> The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

<sup>6</sup> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United

States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

<sup>7</sup> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. <sup>1</sup> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

*Ex parte Siebold*, 100 U. S., 371; *Ex parte Clarke*, 100 U. S., 399; *Ex parte Yarborough*, 110 U. S., 651.

<sup>2</sup> The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. <sup>1</sup> Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

*In re Coy*, 127 U. S., 731; *United States v. Ballin*, 144 U. S., 1.

<sup>2</sup> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

*Kilbourn v. Thompson*, 103 U. S., 168; *Anderson v. Dunn*, 6 Wh., 204; *United States v. Ballin*, 144 U. S., 1.

<sup>3</sup> Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and

Nays of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal.

<sup>4</sup> Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. <sup>1</sup> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

*Coxe v. M'Clenachan*, 3 Dall., 478; *Kilbourn v. Thompson*, 103 U. S., 168.

<sup>2</sup> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION. 7. <sup>1</sup> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

<sup>2</sup> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be



sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

<sup>3</sup> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. <sup>1</sup> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

*Hylton v. United States*, 3 Dall., 171; *McCulloch v. State of Maryland*, 4 Wh., 316; *Longboro' v. Blake*, 5 Wh., 317; *Osborn v. United States Bank*, 9 Wh., 738; *Weston et al. v. City Council of Charlestown*, 2 Pet., 449; *Dobbins v. The Commissioners of Erie County*, 16 Pet., 435; *License Cases*, 5 How., 504; *Cooley v. Board of Wardens of Port of Philadelphia et al.*, 12 How., 299; *McGuire v. The Commonwealth*, 3 Wall., 387; *Van Allen v. The Assessors*, 3 Wall., 573; *Bradley v. The People*, 4 Wall., 459.

*License Tax Cases*, 5 Wall., 462; *Penear v. The Commonwealth*, 5 Wall., 475; *Pa. Ins. Co. v. Soule*, 7 Wall., 433; *Woodruff v. Parham*, 8 Wall., 123; *Hinson v. Lott*, 8 Wall., 148; *Veazie Bank v. Fenno*, 8 Wall., 533; *Nat. Bank v. Commonwealth*, 9 Wall., 353; *The Collector v. Day*, 11 Wall., 113; *United States v. Singer*, 15 Wall., 111; *State*

tax on foreign-held bonds, 15 Wall., 300; *United States v. Railroad Company*, 17 Wall., 322; *Railroad Company v. Peniston*, 18 Wall., 5; *Scholey v. Rew*, 23 Wall., 331; *Cook v. Penn.*, 97 U. S., 566; *Springer v. The United States*, 102 U. S., 580; *Ex parte Curtis*, 106 U. S., 371.

<sup>2</sup> To borrow Money on the credit of the United States;

*McCulloch v. The State of Maryland*, 4 Wh., 316; *Weston et al. v. The City Council of Charlestown*, 2 Pet., 449; *Bank of Commerce v. New York City*, 2 Black, 620; *Bank Tax Cases*, 2 Wall., 200; *Van Allen v. The Assessors*, 3 Wall., 573; *The Banks v. The Mayor*, 7 Wall., 16; *Bank v. Supervisors*, 7 Wall., 26; *Hepburn v. Griswold*, 8 Wall., 603; *National Bank v. Commonwealth*, 9 Wall., 353; *Parker v. Davis*, 12 Wall., 457; *Canal and Banking Company v. New Orleans*, 99 U. S. 97; *Legal Tender Case*, 110 U. S., 421.

<sup>3</sup> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

*Gibbons v. Ogden*, 9 Wh., 1; *Brown et al. v. State of Maryland*, 12 Wh., 419; *Wilson et al. v. Black Bird Creek Marsh Company*, 2 Pet., 245; *Worcester v. The State of Georgia*, 6 Pet., 515; *City of New York v. Miln*, 11 Pet., 102; *United States v. Coombs*, 12 Pet., 72; *Holmes v. Jennison et al.*, 14 Pet., 540; *License Cases*, 5 How., 504; *Passenger Cases*, 7 How., 283; *Nathan v. Louisiana*, 8 How., 73; *Mager v. Grima et al.*, 8 How., 490; *United States v. Marigold*, 9 How., 560; *Cowley v. Board of Wardens of Port of Philadelphia*, 12 How., 299; *The Propeller Genesee Chief et al. v. Fitzhugh et al.*, 12 How., 443; *State of Pennsylvania v. The Wheeling Bridge Company*, 13 How., 518; *Veazie et al. v. Moor*, 14 How., 568; *Smith v. State of Maryland*, 18 How., 71; *State of Pennsylvania v. The Wheeling and Belmont Bridge Company et al.*, 18 How., 421; *Sinnitt v. Davenport*, 22 How., 227; *Foster et al. v. Davenport et al.*, 22 How., 244; *Conway et al. v. Taylor's ex.*, 1 Black, 603; *United States v. Holliday*, 3 Wall., 407; *Gilman v. Philadelphia*, 3 Wall., 713; *The Passaic Bridges*, 3 Wall., 782; *Steamship Company v. Port Wardens*, 6 Wall., 31; *Crandall v. State of Nevada*, 6 Wall., 35; *White's Bank v. Smith*, 7 Wall., 646; *Waring v. The Mayor*, 8 Wall., 110; *Woodruff v. Parham*, 8 Wall., 123; *Paul v. Virginia*, 8 Wall., 168; *Thomson v. Pacific Railroad*, 9 Wall., 579; *Downham et al. v. Alexandria Council*, 10 Wall., 173; *The Clinton Bridge*, 10 Wall., 454; *The Daniel Ball*, 10 Wall., 557; *Liverpool Insurance Company v. Massachusetts*, 10 Wall., 566; *The Montello*, 11 Wall., 411; *Ex parte McNeil*, 13 Wall., 236; *State freight-tax*, 15 Wall., 232; *State tax on railway gross receipts*, 15 Wall., 284; *Osborn v. Mobile*, 16 Wall., 479; *Railroad Company v. Fuller*, 17 Wall., 560; *Bartemeyer v. Iowa*, 18 Wall., 129; *The Delaware railroad tax*, 18 Wall., 206; *Peete v. Morgan*, 19 Wall., 581; *Railroad Company v. Richmond*, 19 Wall., 584; *Railroad*

Company v. Maryland, 21 Wall., 456 ; The Lottawanna, 21 Wall., 558 ; Henderson et al. v. The Mayor of the City of New York, 92 U. S., 259 ; Chy Lung v. Freeman et al., 92 U. S., 275 ; South Carolina v. Georgia et al., 93 U. S., 4 ; Sherlock et al v. Alling, adm., 93 U. S., 99 ; United States v. Forty-three Gallons of Whisky, etc., 93 U. S., 188 ; Munn v. Illinois, 94 U. S., 113 ; Foster v. Master and Wardens of the Port of New Orleans, 94 U. S., 246 ; Packet Company v. Keokuk, 95 U. S., 80 ; Pound v. Turck, 95 U. S., 459 ; Railroad Company v. Husen, 95 U. S., 465 ; Hall v. DeCuir, 95 U. S., 485 ; Pensacola Telegraph Company v. Western Union Telegraph Company, 96 U. S., 1 ; Cook v. Pennsylvania, 97 U. S., 566 ; Fertilizing Company v. Hyde Park, 97 U. S., 659 ; Packet Company v. St. Louis, 100 U. S., 423 ; Vicksburg v. Tobin, 100 U. S., 430 ; Guy v. Baltimore, 100 U. S., 434 ; Machine Company v. Gage, 100 U. S., 676 ; Tiernan v. Rinker, 102 U. S., 123 ; Railway Company v. Renwick, 102 U. S., 180 ; Lord v. Steamship Company, 102 U. S., 541 ; Wilson v. McNanee, 102 U. S., 572 ; Telegraph Company v. Texas, 105 U. S., 460 ; Packet Company v. Catlettsburg, 105 U. S., 559 ; People v. Compagnie Générale Transatlantique, 107 U. S., 59 ; Civil Rights Cases, 109 U. S., 3 ; Milles v. Mayor of New York, 109 U. S., 385 ; Ex parte Crow Dog, 109 U. S., 556 ; Moran v. New Orleans, 112 U. S., 69 ; Head Money Cases, 112 U. S., 580 ; Cardwell v. American Bridge Company, 113 U. S., 205 ; Cooper Manufacturing Company v. Ferguson, 113 U. S., 727 ; Gloucester Ferry Company v. Pennsylvania, 114 U. S., 196 ; Brown v. Houston, 114 U. S., 622 ; Starin v. New York, 115 U. S., 248 ; Stone v. Illinois Central Railroad Company, 116 U. S., 347 ; Stone v. New Orleans and Northeastern Railroad Company, 116 U. S., 352 ; Walling v. Michigan, 116 U. S., 446 ; Coe v. Errol, 116 U. S., 517 ; Pickard v. Pullman Southern Car Company, 117 U. S., 34 ; Tennessee v. Pullman Southern Car Company, 117 U. S., 51 ; Turpin v. Burgess, 117 U. S., 504 ; Sprague v. Thompson, 118 U. S., 90 ; Morgan v. Louisiana, 118 U. S., 455 ; Wabash, St. Louis, and Pacific Railway v. Illinois, 118 U. S., 557 ; Huse v. Glover, 119 U. S., 543 ; United States v. Aryona, 120 U. S., 479 ; Robbins v. Shelby County Taxing District, 120 U. S., 489 ; Corson v. Maryland, 120 U. S., 502 ; Fargo v. Michigan, 121 U. S., 230 ; Philadelphia and Southern Steamship Company v. Pennsylvania, 122 U. S., 326 ; Western Union Telegraph Company v. Pendleton, 122 U. S., 347 ; Mugler v. Kansas, 123 U. S., 623 ; Smith v. Alabama, 124 U. S., 465 ; Willamette Iron Bridge Company v. Hatch, 125 U. S., 1 ; Pembina Mining Company v. Pennsylvania, 125 U. S., 181 ; Bowman v. Chicago and Northwestern Railway Company, 125 U. S., 465 ; California v. Central Pacific Railway Company, 127 U. S., 1 ; Ratterman v. Western Union Telegraph Company, 127 U. S., 411 ; LeLoup v. Port of Mobile, 127 U. S., 640 ; Kidd v. Pearson, 128 U. S., 1 ; Asher v. Texas, 128 U. S., 129 ; Kimmish v. Ball, 129 U. S., 217 ; Leidy v. Hardin, 135 U. S., 100 ; Minnesota v. Barber, 136 U. S., 314 ; Brimmer v. Rebman, 138 U. S., 78 ; Leeper v. Texas, 139 U. S., 462 ; *In re Rahner*,

Petitioner, 140 U. S., 545; *Pullman's Palace Car Company v. Pennsylvania*, 141 U. S., 13; *Crutcher v. Kentucky*, 141 U. S., 47; *Budd v. New York*, 143 U. S., 517; *Voights v. Wright*, 148 U. S., 62; *Harmon v. Chicago*, 141 U. S., 396; *Harmon v. Chicago*, 147 U. S., 396; *Brennan v. Titusville*, 153 U. S., 289; *Brass v. Stoesser*, 153 U. S., 391; *Ashley v. Ryan*, 153 U. S., 436; *Luxton v. North River Bridge Company*, 153 U. S., 525; *Postal Telegraph Company v. Charleston*, 153 U. S., 692; *Covington and Cincinnati Bridge Company v. Kentucky*, 154 U. S., 204.

<sup>4</sup> To establish an uniform Rule of Naturalization,<sup>1</sup> and uniform Laws on the subject of Bankruptcies throughout the United States;<sup>2</sup>

<sup>2</sup> *Sturges v. Crowninshield*, 4 Wh., 122; <sup>2</sup> *McMillan v. McNeil*, 4 Wh., 209; <sup>2</sup> *Farmers and Mechanics' Bank, Pennsylvania, v. Smith*, 6 Wh., 131; <sup>2</sup> *Ogden v. Saunders*, 12 Wh., 213; <sup>2</sup> *Boyle v. Zacharie and Turner*, 6 Pet., 348; <sup>1</sup> *Gassies v. Ballou*, 6 Pet., 761; <sup>2</sup> *Beers et al. v. Haughton*, 9 Pet. 329; <sup>2</sup> *Suydam et al. v. Broadnax*, 14 Pet., 67; <sup>2</sup> *Cook v. Moffat et al.*, 5 How., 295; <sup>1</sup> *Dred Scott v. Sanford*, 19 How., 393; <sup>1</sup> *Chay Yung v. Freeman*, 92 U. S., 275; <sup>1</sup> *Chew Heong v. The United States*, 112 U. S., 536; <sup>1</sup> *Yick Wo v. Hopkins*, 118 U. S., 356; <sup>1</sup> *United States v. Yung Ah Lung*, 124 U. S., 624; <sup>1</sup> *Chae Chan Ping v. The United States*, 130 U. S., 581; <sup>1</sup> *Nishimura Ekin v. United States*, 142 U. S., 651; <sup>1</sup> *Fong Yue Ting v. United States*, 149 U. S., 698; <sup>1</sup> *Lee v. The United States*, 150 U. S., 476.

<sup>5</sup> To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

*Briscoe v. The Bank of the Commonwealth of Kentucky*, 11 Pet., 257; *Fox v. The State of Ohio*, 5 How., 410; *United States v. Marigold*, 9 How., 560.

<sup>6</sup> To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

*Fox v. The State of Ohio*, 5 How., 410; *United States v. Marigold*, 9 How., 560.

<sup>7</sup> To establish Post Offices and post Roads;

*State of Pennsylvania v. The Wheeling and Belmont Bridge Company*, 18 How., 421.

<sup>8</sup> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

*Grant et al. v. Raymond*, 6 Pet., 218; *Wheaton et als. v. Peters et als.*, 8 Pet., 591.

<sup>9</sup> To constitute Tribunals inferior to the supreme Court;

<sup>10</sup> To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

*United States v. Palmer*, 3 Wh., 610 ; *United States v. Wiltberger*, 5 Wh., 76 ; *United States v. Smith*, 5 Wh., 153 ; *United States v. Pirates*, 5 Wh., 184.

<sup>11</sup> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

*Brown v. United States*, 8 Cr., 110 ; *American Insurance Company et al. v. Canter* (356 bales cotton), 1 Pet., 511 ; *Mrs. Alexander's cotton*, 2 Wall., 404 ; *Miller v. United States*, 11 Wall., 268 ; *Tyler v. Defrees*, 11 Wall., 331 ; *Stewart v. Kahn*, 11 Wall., 493 ; *Hamilton v. Dillin*, 21 Wall., 73 ; *Laman, ex. v. Browne et al.*, 92 U. S., 187.

<sup>12</sup> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

*Crandall v. State of Nevada*, 6 Wall., 35.

<sup>13</sup> To provide and maintain a Navy;

*United States v. Bevans*, 3 Wh., 336 ; *Dynes v. Hooper*, 20 How., 65.

<sup>14</sup> To make Rules for the Government and Regulation of the land and naval Forces;

<sup>15</sup> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

*Houston v. Moore*, 5 Wh., 1 ; *Martin v. Mott*, 12 Wh., 19 ; *Luther v. Borden*, 7 How., 1 ; *Crandall v. State of Nevada*, 6 Wall., 35 ; *Texas v. White*, 7 Wall., 700.

<sup>16</sup> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

*Houston v. Moore*, 5 Wh., 1 ; *Martin v. Mott*, 12 Wh., 19 ; *Luther v. Borden*, 7 How., 1.

<sup>17</sup> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places pur-

chased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—  
And

*Hepburn et al. v. Ellzey*, 2 Cr., 445; *Longhboro' v. Blake*, 5 Wh., 317; *Cohens v. Virginia*, 6 Wh., 264; *American Insurance Company v. Canter* (356 bales cotton), 1 Pet., 511; *Kendall, Postmaster-General, v. The United States*, 12 Pet., 524; *United States v. Dewitt*, 9 Wall., 41; *Dumphy v. Kleinsmith et al.*, 11 Wall., 610; *Willard v. Presbury*, 14 Wall., 676; *Phillips v. Payne*, 92 U. S., 130; *United States v. Fox*, 94 U. S., 315; *Fort Leavenworth Railroad Company v. Howe*, 114 U. S., 525; *Gibbons v. District of Columbia*, 116 U. S., 404; *Stoutenburg v. Henrich*, 129 U. S., 141; *Bonson v. United States*, 146 U. S., 325; *Shoemaker v. The United States*, 147 U. S., 282.

<sup>18</sup> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

*McCulloch v. The State of Maryland*, 4 Wh., 316; *Wayman v. Southard*, 10 Wh., 1; *Bank of United States v. Halstead*, 10 Wh., 51; *Hepburn v. Griswold*, 8 Wall., 603; *National Bank v. Commonwealth*, 9 Wall., 353; *Thomson v. Pacific Railroad*, 9 Wall., 579; *Parker v. Davis*, 12 Wall., 457; *Railroad Company v. Johnson*, 15 Wall., 195; *Railroad Company v. Peniston*, 18 Wall., 5; *Ex parte Curtis*, 106 U. S., 371; *Legal Tender Cases*, 110 U. S., 421; *Cole v. La Grange*, 113 U. S., 1; *Van Brocklins v. Tennessee*, 117 U. S., 151; *Stoutenburg v. Henrick*, 129 U. S., 141.

SECTION. 9. <sup>1</sup> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

*Dred Scott v. Sanford*, 19 How., 393.

<sup>2</sup> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

*United States v. Hamilton*, 3 Dall., 17; *Ex parte Bollman and Swartwout*, 4 Cr., 75; *Ex parte Kearney*, 7 Wh., 38; *Ex parte Tobias Wat-*

kins, 3 Pet., 193; *Ex parte Milburn*, 9 Pet., 704; *Holmes v. Jennison et al.*, 14 Pet., 540; *Ex parte Dorr*, 3 How., 103; *Luther v. Borden*, 7 How., 1; *Ableman v. Booth and United States v. Booth*, 21 How., 506; *Ex parte Vallandigham*, 1 Wall., 243; *Ex parte Milligan*, 4 Wall., 2; *Ex parte McCardle*, 7 Wall., 506; *Ex parte Yerger*, 8 Wall., 85; *Tarble's case*, 13 Wall., 397; *Ex parte Lange*, 18 Wall., 163; *Ex parte Parks*, 93 U. S., 18; *Ex parte Karstendick*, 93 U. S., 396; *Ex parte Read*, 100 U. S., 13; *Ex parte Virginia*, 100 U. S., 339; *Ex parte Siebold*, 100 U. S., 371; *Ex parte Clarke*, 100 U. S., 399; *Ex parte Curtis*, 106 U. S., 371; *United States v. Gale*, 109 U. S., 65; *Ex parte Wilson*, 114 U. S., 417; *In re Ayers*, 123 U. S., 443; *In re Coy*, 127 U. S., 731; *United States v. Jung Ah Lung*, 124 U. S., 621; *In re Shubuya Jūgiro*, 140 U. S., 291; *Fong Tue Ting v. United States*, 149 U. S., 698.

<sup>3</sup> No Bill of Attainder or ex post facto Law shall be passed.

*Fletcher v. Peck*, 6 Cr., 87; *Ogden v. Saunders*, 12 Wh., 213; *Watson et al. v. Mercer*, 8 Pet., 88; *Carpenter et al. v. Commonwealth of Pennsylvania*, 17 How., 456; *Locke v. New Orleans*, 4 Wall., 172; *Cummings v. The State of Missouri*, 4 Wall., 277; *Ex parte Garland*, 4 Wall., 333; *Drehman v. Stifle*, 8 Wall., 595; *Klinger v. State of Missouri*, 13 Wall., 257; *Pierce v. Carskadon*, 16 Wall., 234; *Kring v. Missouri*, 107 U. S., 221; *Hopt v. Utah*, 110 U. S., 574.

<sup>4</sup> No Capitation, or other direct, tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

*License Tax Cases*, 5 Wall., 462; *Pervear v. The Commonwealth*, 5 Wall., 475; *Veazie Bank v. Fenno*, 8 Wall., 533; *National Bank v. The United States*, 101 U. S., 1.

<sup>5</sup> No Tax or Duty shall be laid on Articles exported from any State.

*Cooley v. Board of Wardens of Port of Philadelphia*, 12 How., 299; *Page v. Burgess, collector*, 92 U. S., 372.

<sup>6</sup> No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

*Cooley v. Board of Wardens of Port of Philadelphia et al.*, 12 How., 299; *State of Pennsylvania v. Wheeling and Belmont Bridge Company et al.*, 18 How., 421; *Munn v. Illinois*, 94 U. S., 113.

<sup>7</sup> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regu-

lar Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

<sup>8</sup>No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. <sup>1</sup>No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit;<sup>1</sup> make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law,<sup>2</sup> or Law impairing the Obligation of Contracts,<sup>3</sup> or grant any Title of Nobility.

<sup>2</sup>Calder and wife v. Bull and wife, 3 Dall., 386; <sup>3</sup>Fletcher v. Peck, 6 Cr., 87; <sup>3</sup>State of New Jersey v. Wilson, 7 Cr., 164; <sup>3</sup>Sturgis v. Crowningshield, 4 Wh., 122; <sup>3</sup>McMillan v. McNeil, 4 Wh., 209; <sup>3</sup>Dartmouth College v. Woodward, 4 Wh., 518; <sup>3</sup>Owings v. Speed, 5 Wh., 420; <sup>3</sup>Farmers' and Mechanics' Bank v. Smith, 6 Wh., 131; <sup>3</sup>Green et al. v. Biddle, 8 Wh., 1; <sup>2</sup>Society v. New Haven, 8 Wh., 464; <sup>3</sup>Ogden v. Saunders, 12 Wh., 213; <sup>3</sup>Mason v. Haile, 12 Wh., 370; <sup>3</sup>Satterlee v. Matthewson, 2 Pet., 380; <sup>3</sup>Hart v. Lamphire, 3 Pet., 280; <sup>1</sup>Craig et al. v. State of Missouri, 4 Pet., 410; <sup>3</sup>Providence Bank v. Billings and Pitman, 4 Pet., 514; <sup>1</sup>Byrne v. State of Missouri, 8 Pet., 40; <sup>2</sup>Watson v. Mercer, 8 Pet., 88; <sup>3</sup>Mumma v. Potomac Company, 8 Pet., 281; <sup>3</sup>Beers v. Haughton, 9 Pet., 329; <sup>1</sup>Briscoe et al. v. The Bank of the Commonwealth of Kentucky, 11 Pet., 257; <sup>3</sup>The Proprietors of Charles River Bridge v. The Proprietors of Warren Bridge, 11 Pet., 420; <sup>3</sup>Armstrong v. The Treasurer of Athens Company, 16 Pet., 281; <sup>3</sup>Bronson v. Kinzie et al., 1 How., 311; <sup>3</sup>McCracken v. Hayward, 2 How., 608; <sup>3</sup>Gordon v. Appeal Tax Court, 3 How., 133; <sup>3</sup>State of Maryland v. Baltimore and Ohio Railroad Company, 3 How., 534; <sup>3</sup>Neil, Moore & Co. v. State of Ohio, 3 How., 720; <sup>3</sup>Cook v. Moffatt, 5 How., 295; <sup>3</sup>Planters' Bank v. Sharp et al., 6 How., 301; <sup>3</sup>West River Bridge Company v. Dix et al., 6 How., 507; <sup>3</sup>Crawford et al. v. Branch Bank of Mobile, 7 How., 279; <sup>3</sup>Woodruff v. Trapnall, 10 How., 190; <sup>3</sup>Paup et al. v. Drew, 10 How., 218; <sup>2</sup>, <sup>3</sup>Baltimore and Susquehanna Railroad Company v. Nesbitt et al., 10 How., 395; <sup>3</sup>Butler et al. v. Pennsylvania, 10 How., 402; <sup>1</sup>Darlington et al. v. The Bank of Alabama, 13 How., 12; <sup>3</sup>Richmond, &c., Railroad Company v. The Louise Railroad Company, 13 How., 71; <sup>3</sup>Trustees



for Vincennes University *v.* State of Indiana, 14 How., 268; <sup>3</sup>Curran *v.* State of Arkansas et al., 15 How., 304; <sup>3</sup>State Bank of Ohio *v.* Knoop, 16 How., 369; <sup>2</sup>Carpenter et al. *v.* Commonwealth of Pennsylvania, 17 How., 456; <sup>3</sup>Dodge *v.* Woolsey, 18 How., 331; <sup>3</sup>Beers *v.* State of Arkansas, 20 How., 527; <sup>3</sup>Aspinwall et al. *v.* Commissioners of County of Daviess, 22 How., 364; <sup>3</sup>Rector of Christ Church, Philadelphia, *v.* County of Philadelphia, 24 How., 300; <sup>3</sup>Howard *v.* Bugbee, 24 How., 461; <sup>3</sup>Jefferson Branch Bank *v.* Skelley, 1 Black, 436; <sup>3</sup>Franklin Branch Bank *v.* State of Ohio, 1 Black, 474; <sup>3</sup>Trustees of the Wabash and Erie Canal Company *v.* Beers, 2 Black, 448; <sup>3</sup>Gilman *v.* City of Sheboygan, 2 Black, 510; <sup>3</sup>Bridge Proprietors *v.* Hoboken Company, 1 Wall., 116; <sup>3</sup>Hawthorne *v.* Calef, 2 Wall., 10; <sup>3</sup>The Binghamton Bridge, 3 Wall., 51; <sup>3</sup>The Turnpike Company *v.* The State, 3 Wall., 210; <sup>2</sup>Locke *v.* City of New Orleans, 4 Wall., 172; <sup>3</sup>Railroad Company *v.* Rock, 4 Wall., 177; <sup>3</sup>Cummings *v.* State of Missouri, 4 Wall., 277; <sup>2</sup>Ex parte Garland, 4 Wall., 333; <sup>3</sup>Von Hoffman *v.* City of Quincy, 4 Wall., 535; <sup>3</sup>Mulligan *v.* Corbin, 7 Wall., 487; <sup>3</sup>Furman *v.* Nichol, 8 Wall., 44; <sup>3</sup>Home of the Friendless *v.* Rouse, 8 Wall., 430; <sup>3</sup>The Washington University *v.* Rouse, 8 Wall., 439; <sup>3</sup>Butz *v.* City of Muscatine, 8 Wall., 575; <sup>3</sup>Drehman *v.* Stifle, 8 Wall., 595; <sup>3</sup>Hepburn *v.* Griswold, 8 Wall., 603; <sup>2</sup>Gut *v.* The State, 9 Wall., 35; <sup>3</sup>Railroad Company *v.* McClure, 10 Wall., 511; <sup>3</sup>Parker *v.* Davis, 12 Wall., 457; <sup>3</sup>Curtis *v.* Whiting, 13 Wall., 68; <sup>3</sup>Pennsylvania College Cases, 13 Wall., 190; <sup>3</sup>Wilmington Railroad *v.* Reid, sheriff, 13 Wall., 264; <sup>3</sup>Salt Company *v.* East Saginaw, 13 Wall., 373; <sup>3</sup>White *v.* Hart, 13 Wall., 646; <sup>3</sup>Osborn *v.* Nicholson et al., 13 Wall., 654; <sup>3</sup>Railroad Company *v.* Johnson, 15 Wall., 195; <sup>3</sup>Case of the State tax on foreign-held bonds, 15 Wall., 300; <sup>3</sup>Tomlinson *v.* Jessup, 15 Wall., 454; <sup>3</sup>Tomlinson *v.* Branch, 15 Wall., 460; <sup>3</sup>Miller *v.* The State, 15 Wall., 478; <sup>3</sup>Holyoke Company *v.* Lyman, 15 Wall., 500; <sup>3</sup>Gunn *v.* Barry, 15 Wall., 610; <sup>3</sup>Humphrey *v.* Pegues, 16 Wall., 244; <sup>3</sup>Walker *v.* Whitehead, 16 Wall., 314; <sup>3</sup>Sohn *v.* Waterson, 17 Wall., 596; <sup>3</sup>Baring *v.* Dabney, 19 Wall., 1; <sup>3</sup>Head *v.* The University, 19 Wall., 526; <sup>3</sup>Pacific Railroad Company *v.* Maguire, 20 Wall., 36; <sup>3</sup>Garrison *v.* The City of New York, 21 Wall., 196; <sup>3</sup>Ochiltree *v.* The Railroad Company, 21 Wall., 249; <sup>3</sup>Wilmington, etc., Railroad *v.* King, ex., 91 U. S., 3; <sup>3</sup>County of Moultrie *v.* Rockingham Ten Cent Savings Bank, 92 U. S., 631; <sup>3</sup>Home Insurance Company *v.* City Council of Augusta, 93 U. S., 116; <sup>3</sup>West Wisconsin Railroad Company *v.* Supervisors, 93 U. S., 595; <sup>3</sup>Railroad Company, 95 U. S., 168; <sup>3</sup>Farrington *v.* Tennessee, 95 U. S., 679; <sup>3</sup>Tennessee *v.* Sneed, 96 U. S., 69; <sup>3</sup>Williams *v.* Brusby, 96 U. S., 176; <sup>3</sup>Murray *v.* Charleston, 96 U. S., 432; <sup>3</sup>Edwards *v.* Kearney, 96 U. S., 595; <sup>3</sup>Beer Company *v.* Massachusetts, 97 U. S., 25; Keith *v.* Clark, 97 U. S., 454; <sup>3</sup>Railroad Company *v.* Georgia, 98 U. S., 359; <sup>3</sup>University *v.* People, 99 U. S., 309; <sup>3</sup>Sinking Fund Cases, 99 U. S., 700;

<sup>3</sup> *Newton v. Commissioners*, 100 U. S., 548 ; <sup>3</sup> *Railroad Company v. The United States*, 101 U. S., 337 ; <sup>3</sup> *Wright v. Nagle*, 101 U. S., 791 ; <sup>3</sup> *Stone v. Mississippi*, 101 U. S., 814 ; <sup>3</sup> *Louisiana v. New Orleans*, 102 U. S., 203 ; <sup>3</sup> *Hall v. Wisconsin*, 103 U. S., 5 ; <sup>3</sup> *Wolf v. New Orleans*, 103 U. S., 358 ; *Durkee v. Board of Liquidation*, 103 U. S., 646 ; <sup>3</sup> *Pennimor's Case*, 103 U. S., 714 ; <sup>3</sup> *Guaranty Company v. Board of Liquidation*, 105 U. S., 622 ; <sup>3</sup> *Asylum v. New Orleans*, 105 U. S., 362 ; <sup>3</sup> *Greenwood v. Freight Company*, 105 U. S., 13 ; <sup>3</sup> *Antoni v. Greenhow*, 107 U. S., 769 ; <sup>3</sup> *Gross v. United States Mortgage Co.*, 108 U. S., 477 ; <sup>3</sup> *Louisville and Nashville Railroad Company v. Palmer*, 109 U. S., 244 ; <sup>3</sup> *Louisiana v. New Orleans*, 109 U. S., 285 ; <sup>3</sup> *Memphis Gas Light Company v. Taxing District of Shelby County*, 109 U. S., 398 ; <sup>3</sup> *Gilfillen v. Union Canal Company*, 109 U. S., 401 ; <sup>3</sup> *Spring Valley Water Works v. Schottler*, 110 U. S., 347 ; <sup>3</sup> *Nelson v. St. Martin's Parish*, 111 U. S., 716 ; <sup>3</sup> *Butcher's Union Company v. Crescent City Company*, 111 U. S., 746 ; <sup>3</sup> *Foster v. Kansas*, 112 U. S., 201 ; <sup>3</sup> *Virginia Coupon Cases*, 114 U. S., 270 ; <sup>3</sup> *Amy v. Shelby County*, 114 U. S., 387 ; <sup>3</sup> *Effinger v. Kenney*, 115 U. S., 566 ; <sup>3</sup> *New Orleans Gas Company v. Louisiana Light Company*, 115 U. S., 650 ; <sup>3</sup> *New Orleans Water Works v. Rivers*, 115 U. S., 674 ; <sup>3</sup> *Louisiana Gas Light Company v. Citizens' Gas Company*, 115 U. S., 683 ; <sup>3</sup> *Fisk v. Jefferson Police Jury*, 116 U. S., 131 ; <sup>3</sup> *Royall v. Virginia*, 116 U. S., 572 ; <sup>3</sup> *Hagood v. Southern*, 117 U. S., 52 ; <sup>3</sup> *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S., 64 ; <sup>1</sup> *United States v. Arizona*, 120 U. S., 479 ; <sup>3</sup> *Church v. Kelsey*, 121 U. S., 282 ; <sup>3</sup> *Lehigh Water Company v. Easton*, 121 U. S., 388 ; <sup>3</sup> *Leibert v. Lewis*, 122 U. S., 284 ; <sup>3</sup> *New Orleans Water Works v. Louisiana Sugar Refining Company*, 125 U. S., 18 ; <sup>2</sup> *Jaehne v. New York*, 128 U. S., 189 ; <sup>3</sup> *Denny v. Bennett*, 128 U. S., 489 ; <sup>3</sup> *Freeland v. Williams*, 131 U. S., 405 ; <sup>3</sup> *Scotland County Court v. Hill*, 140 U. S., 41 ; <sup>3</sup> *Essex Public Road Board v. Skinkle*, 140 U. S., 334 ; <sup>3</sup> *Stein v. Bienville Water Supply Company*, 141 U. S., 67 ; <sup>3</sup> *Morley v. Lake Shore and Michigan Southern Railway Company*, 146 U. S., 162 ; <sup>3</sup> *Hamilton Gas Light and Coke Company v. Hamilton City*, 146 U. S., 258 ; <sup>3</sup> *Schurz v. Cook*, 148 U. S., 397 ; <sup>3</sup> *Bryant v. Board of Education*, 151 U. S., 639 ; <sup>2</sup> *Duncan v. Missouri*, 152 U. S., 377 ; <sup>3</sup> *New York, Lake Erie and Western Railroad v. Pennsylvania*, 153 U. S., 628.

<sup>2</sup> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

*Brown v. The State of Maryland*, 12 Wh., 419 ; *Mager v. Grima et al.*, 8 How., 490 ; *Cooley v. Board of Wardens of Port of Philadelphia*

et al., 12 How., 299; *Almy v. State of California*, 24 How., 169; *License Tax Cases*, 5 Wall., 462; *Crandall v. State of Nevada*, 6 Wall., 35; *Waring v. The Mayor*, 8 Wall., 110; *Woodruff v. Perham*, 8 Wall., 123; *Hinson v. Lott*, 8 Wall., 148; *State tax on railway gross receipts*, 15 Wall., 284; *Brown v. Houston*, 114 U. S., 622; *Stone v. Farmers' Loan and Trust Company*, 116 U. S., 307.

<sup>3</sup> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

*Green v. Biddle*, 8 Wh., 1; *Poole et al. v. The Lessee of Fleeger et al.*, 11 Pet., 185; *Cooley v. Board of Wardens of Port of Philadelphia et al.*, 12 How., 299; *State Tonnage Tax Cases*, 12 Wall., 204; *Peete v. Morgan*, 19 Wall., 581; *Cannon v. New Orleans*, 20 Wall., 577; *Inman Steamship Company v. Tinker*, 94 U. S., 238; *Packet Company v. Keskats*, 95 U. S., 80; *Morgan v. Louisiana*, 118 U. S., 455; *Huse v. Glover*, 119 U. S., 543; *Ouachita Packet Company v. Aiken*, 121 U. S., 444.

## ARTICLE. II.

SECTION. 1. <sup>1</sup> The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

<sup>2</sup> Each State shall appoint, in such Manner as the Legislature there of may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

*McPherson v. Blacker*, 146 U. S., 1.

[“The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the

Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed ; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President ; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote ; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.”]

This clause has been superseded by the twelfth amendment.

<sup>3</sup> The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes ; which Day shall be the same throughout the United States.

<sup>4</sup> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President ; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

*Inglis v. The Trustees of the Sailors’ Snug Harbor*, 3 Pet., 99.

<sup>5</sup> In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

<sup>6</sup> The President shall, at stated Times, receive for his

Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

<sup>7</sup> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

SECTION. 2. <sup>1</sup> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

*United States v. Wilson*, 7 Pet., 150; *Ex parte William Wells*, 18 How., 307; *Ex parte Garland*, 4 Wall., 333; *Armstrong's Foundry*, 6 Wall., 766; *United States v. Padelford*, 9 Wall., 531; *United States v. Klein*, 13 Wall., 128; *Armstrong v. The United States*, 13 Wall., 154; *Pargond v. The United States*, 13 Wall., 156; *Lamar, ex., v. Browne et al.*, 92 U.S., 187; *Wallach et al. v. Van Riswick*, 92 U.S., 202; *Knote v. United States*, 95 U.S., 149.

<sup>2</sup> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior

Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

*Ware v. Hylton et al.*, 3 Dall., 199; *Marbury v. Madison*, 1 Cr., 137; *Owings v. Norwood's Lessee*, 5 Cr., 344; *United States v. Kirkpatrick*, 9 Wh., 720; *American Insurance Company v. Canter* (356 bales cotton), 1 Pet., 511; *Foster and Elam v. Neilson*, 2 Pet., 253; *Cherokee Nation v. State of Georgia*, 5 Pet., 1; *Patterson v. Gwinn et al.*, 5 Pet., 233; *Worcester v. State of Georgia*, 6 Pet., 515; *City of New Orleans v. De Armas et al.*, 9 Pet., 223; *Dobbins v. Commissioners of Erie County*, 16 Pet., 435; *Holden v. Joy*, 17 Wall., 211; *United States v. Rauscher*, 119 U. S., 407; *Baldwin v. Frank*, 120 U. S., 678; *Chinese Exclusion Cases*, 130 U. S., 581; *Shoemaker v. The United States*, 147 U. S., 282.

<sup>3</sup> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

*The United States v. Kirkpatrick et al.*, 9 Wh., 720.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

*Marbury v. Madison*, 1 Cr., 137; *Kendall, Postmaster-General, v. The United States*, 12 Pet., 524; *The State of Mississippi v. Johnson, President*, 4 Wall., 475; *Stewart v. Kahn*, 11 Wall., 493.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

## ARTICLE III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Hayburn's case (notes), 2 Dall., 409; *Stuart v. Laird*, 1 Cr., 299; *United States v. Peters*, 5 Cr., 115; *Martin v. Hunter's Lessee*, 1 Wh., 304; *Cohens v. Virginia*, 6 Wh., 264; *Ex parte Vallandigham*, 1 Wall., 243.

SECTION. 2. <sup>1</sup>The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Hayburn's case (note), 2 Dall., 409; *Chisholm, ex. v. Georgia*, 2 Dall., 419; *Glass et al. v. Sloop Betsey*, 3 Dall., 6; *United States v. La Vengeance*, 3 Dall., 297; *Hollingsworth et al. v. Virginia*, 3 Dall., 378; *Mossman, ex. v. Higginson*, 4 Dall., 12; *Marbury v. Madison*, 1 Cr., 137; *Hepburn et al. v. Ellezley*, 2 Cr., 444; *United States v. Moore*, 3 Cr., 159; *Strawbridge et al. v. Curtiss et al.*, 3 Cr., 267; *Ex parte Bollman and Swartwout*, 4 Cr., 75; *Rose v. Himely*, 4 Cr., 241; *Chappedelaine et al. v. Dechenaux*, 4 Cr., 306; *Hope Insurance Company v. Boardman et al.*, 5 Cr., 57; *Bank of United States v. Devaux et al.*, 5 Cr., 61; *Hodgson et als. v. Bowerbank et als.*, 5 Cr., 303; *Owings v. Norwood's Lessee*, 5 Cr., 344; *Durousseau v. The United States*, 6 Cr., 307; *United*

States *v.* Hudson and Goodwin, 7 Cr., 32; *Martin v. Hunter*, 1 Wh., 304; *Colson et al. v. Lewis*, 2 Wh., 377; *United States v. Bevans*, 3 Wh., 336; *Cohens v. Virginia*, 6 Wh., 264; *Ex parte Kearney*, 7 Wh., 38; *Osborn v. United States Bank*, 9 Wh., 738; *United States v. Ortega*, 11 Wh., 467; *American Insurance Company v. Canter* (356 bales cotton), 1 Pet., 511; *Jackson v. Twentyman*, 2 Pet., 136; *Weston v. The City Council of Charleston*, 2 Pet., 449; *Cherokee Nation v. State of Georgia*, 5 Pet., 1; *State of New Jersey v. State of New York*, 5 Pet., 283; *Davis v. Packard et al.*, 6 Pet., 41; *United States v. Arredondo et al.*, 6 Pet., 691; *Davis v. Packard et al.*, 7 Pet., 276; *Breedlove et al. v. Nickolet et al.*, 7 Pet., 413; *Brown v. Keene*, 8 Pet., 112; *Davis v. Packard et al.*, 8 Pet., 312; *City of New Orleans v. De Armas et al.*, 9 Pet., 223; *The State of Rhode Island v. The Commonwealth of Massachusetts*, 12 Pet., 657; *The Bank of Augusta v. Earle*, 13 Pet., 519; *The Commercial and Railroad Bank of Vicksburg v. Slocomb et al.*, 14 Pet., 60; *Suydam et al. v. Broadnax*, 14 Pet., 67; *Holmes v. Jennison*, 14 Pet., 540; *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet., 539; *Louisville, Cincinnati and Charleston Railway Company v. Letson*, 2 How., 497; *Cary et als. v. Curtis*, 3 How., 236; *Warring v. Clark*, 5 How., 441; *Luther v. Borden*, 7 How., 1; *Sheldon et al. v. Sill*, 8 How., 441; *The Propeller Genesee Chief v. Fitzhugh et al.*, 12 How., 443; *Fretz et al. v. Ball et al.*, 12 How., 466; *Neves et al. v. Scott et al.*, 13 How., 268; *State of Pennsylvania v. The Wheeling, &c., Bridge Company et al.*, 13 How., 518; *Marshall v. The Baltimore and Ohio R. R. Co.*, 16 How., 314; *The United States v. Guthrie*, 17 How., 284; *Smith v. State of Maryland*, 18 How., 71; *Jones et al. v. League*, 18 How., 76; *Murray's Lessee et al. v. Hoboken Land and Improvement Company*, 18 How., 272; *Hyde et al. v. Stone*, 20 How., 170; *Irvine v. Marshall et al.*, 20 How., 558; *Fenn v. Holmes*, 21 How., 481; *Morewood et al. v. Erequist*, 23 How., 491; *Commonwealth of Kentucky v. Dennison, Governor*, 24 How., 66; *Ohio and Mississippi Railroad Company v. Wheeler*, 1 Black, 286; *The Steamer Saint Lawrence*, 1 Black, 522; *The Propeller Commerce*, 1 Black, 574; *Ex parte Vallandigham*, 1 Wall., 243; *Ex parte Milligan*, 4 Wall., 1; *The Moses Taylor*, 4 Wall., 411; *State of Mississippi v. Johnson, President*, 4 Wall., 475; *The Hine v. Trevor*, 4 Wall., 555; *City of Philadelphia v. The Collector*, 5 Wall., 720; *State of Georgia v. Stanton*, 6 Wall., 50; *Payne v. Hook*, 7 Wall., 425; *The Alicia*, 7 Wall., 571; *Ex parte Yerger*, 8 Wall., 85; *Insurance Company v. Dunham*, 11 Wall., 1; *Virginia v. West Virginia*, 11 Wall., 39; *Coal Company v. Blatchford*, 11 Wall., 172; *Railway Company v. Whitton's adm.*, 13 Wall., 270; *Tarble's Case*, 13 Wall., 397; *Blyew et al. v. The United States*, 13 Wall., 581; *Davis v. Gray*, 16 Wall., 203; *Case of the Sewing Machine Companies*, 18 Wall., 553; *Insurance Company v. Morse*, 20 Wall., 445; *Vannevar v. Bryant*, 21 Wall., 41; *The Lottawanna*, 21 Wall., 558; *Gaines v. Fuentes et al.*, 92 U.S., 10; *Miller v. Dows*, 94



U.S., 444; *Doyle v. Continental Insurance Company*, 94 U.S., 535; *United States v. Union Pacific Railroad Company*, 98 U.S., 569; *Tennessee v. The United States*, 100 U.S., 257; *Allen v. Louisiana*, 103 U.S., 80; *The Francis Wright*, 105 U.S., 381; *Mitchel v. Clark*, 110 U.S., 633; *Bois v. Preston*, 111 U.S., 252; *Ames v. Kansas*, 111 U.S., 449; *Barron v. Burnside*, 121 U.S., 186; *St. Louis Iron Mountain and Southern Railway v. Vickers*, 122 U.S., 360; *United States v. Texas*, 143 U.S., 621.

<sup>2</sup> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make:

*Chisholm, ex. v. Georgia*, 2 Dall., 419; *Wiscart et al. v. Dauchy*, 3 Dall., 321; *Marbury v. Madison*, 1 Cr., 137; *Durousseau et al. v. United States*, 6 Cr., 307; *Martin v. Hunter's Lessee*, 1 Wh., 304; *Cohens v. Virginia*, 6 Wh., 264; *Ex parte Kearney*, 7 Wh., 38; *Wayman v. Southard*, 10 Wh., 1; *Bank of the United States v. Halstead*, 10 Wh., 51; *United States v. Ortega*, 11 Wh., 467; *The Cherokee Nation v. The State of Georgia*, 5 Pet., 1; *Ex parte Crane et als.*, 5 Pet., 190; *The State of New Jersey v. The State of New York*, 5 Pet., 284; *Ex parte Sibbald v. United States*, 12 Pet., 488; *The State of Rhode Island v. The State of Massachusetts*, 12 Pet., 657; *State of Pennsylvania v. The Wheeling, &c., Bridge Company*, 13 How., 518; *In re Kaine*, 14 How., 103; *Ableman v. Booth and United States v. Booth*, 21 How., 506; *Freeborn v. Smith*, 2 Wall., 160; *Ex parte McCardle*, 6 Wall., 318; *Ex parte McCardle*, 7 Wall., 506; *Ex parte Yerger*, 8 Wall., 85; *The Lucy*, 8 Wall., 307; *The Justices v. Murray*, 9 Wall., 274; *Pennsylvania v. Quicksilver Company*, 10 Wall., 553; *Murdock v. City of Memphis*, 20 Wall., 590.

<sup>3</sup> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

*Ex parte Milligan*, 4 Wall., 2; *Callan v. Wilson*, 127 U.S., 540; *Nashville and Chattanooga Railway v. Alabama*, 128 U.S., 96.

SECTION. 3. <sup>1</sup> Treason against the United States, shall consist only in levying War against them, or in adhering

to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

*United States v. The Insurgents*, 2 Dall., 334; *United States v. Mitchell*, 2 Dall., 348; *Ex parte Bollman and Swartwout*, 4 Cr., 75; *United States v. Aaron Burr*, 4 Cr., 469; *Hanauer v. Doane*, 12 Wall., 342; *Carlisle v. The United States*, 16 Wall., 147; *Sprott v. United States*, 20 Wall., 459; *Young v. United States*, 97 U. S., 39.

<sup>2</sup> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

*Bigelow v. Forest*, 9 Wall., 339; *McVeigh v. United States*, 11 Wall., 259; *Miller v. The United States*, 11 Wall., 268; *Day v. Micou*, 18 Wall., 156; *Wallack et al. v. Van Riswick*, 92 U. S., 202; *Pike v. Russell*, 94 U. S., 711; *United States v. Dunnington*, 146 U. S., 338; *Jenkins v. Col-lard*, 145 U. S., 546.

## ARTICLE IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

*Mills v. Duryee*, 7 Cr., 481; *Hampton v. McConnel*, 3 Wh., 234; *Mayhew v. Thatcher*, 6 Wh., 129; *Darby's Lessee v. Mayer*, 10 Wh., 465; *The United States v. Amedy*, 11 Wh., 392; *Caldwell et al. v. Car-rington's heirs*, 9 Pet., 86; *M'Elmoyle v. Cohen*, 13 Pet., 312; *The Bank of Augusta v. Earle*, 13 Pet., 519; *Bank of the State of Alabama v. Dalton*, 9 How., 522; *D'Arcy v. Ketchum*, 11 How., 165; *Christmas v. Russell*, 5 Wall., 290; *Green v. Van Baskirk*, 7 Wall., 139; *Paul v. Vir-ginia*, 8 Wall., 168; *Board of Public Works v. Columbia College*, 17 Wall., 521; *Thompson v. Whitman*, 18 Wall., 457; *Bonaparte v. Tax Court*, 104 U. S., 592; *Embray v. Palmer*, 107 U. S., 3; *Hanley v. Donahue*, 116 U. S., 1; *Renaud v. Abbott*, 116 U. S., 277; *Chicago and Alton Railroad v. Wiggins Ferry Company*, 119 U. S., 615; *Cole v. Cunning-ham*, 133 U. S., 107.

SECTION. 2. <sup>1</sup> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

*Bank of United States v. Devereaux*, 5 Cr., 61 ; *Gassies v. Ballou*, 6 Pet., 761 ; *The State of Rhode Island v. The Commonwealth of Massachusetts*, 12 Pet., 657 ; *The Bank of Augusta v. Earle*, 13 Pet., 519 ; *Moore v. The People of the State of Illinois*, 14 How., 13 ; *Conner et al. v. Elliott et al.*, 18 How., 591 ; *Dred Scott v. Sanford*, 19 How., 393 ; *Crandall v. State of Nevada*, 6 Wall., 35 ; *Woodruff v. Parham*, 8 Wall., 123 ; *Paul v. Virginia*, 8 Wall., 168 ; *Downham v. Alexandria Council*, 10 Wall., 173 ; *Liverpool Insurance Company v. Massachusetts*, 10 Wall., 566 ; *Ward v. Maryland*, 12 Wall., 418 ; *Slaughter-house Cases*, 16 Wall., 36 ; *Bradwell v. The State*, 16 Wall., 130 ; *Chemung Bank v. Lowery*, 93 U. S., 72 ; *McCready v. Virginia*, 94 U. S., 391 ; *United States v. Harris*, 106 U. S., 629 ; *Baldwin v. Franks*, 120 U. S., 678 ; *Pembina Mining Company v. Pennsylvania*, 125 U. S., 181 ; *Kimmish v. Ball*, 129 U. S., 217 ; *United States v. Rauscher*, 119 U. S., 407.

<sup>2</sup> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.

*Holmes v. Jennison et al.*, 14 Pet., 540 ; *Commonwealth of Kentucky v. Dennison, governor*, 24 How., 66 ; *Taylor v. Tainter*, 16 Wall., 366 ; *Mahne v. Justice*, 127 U. S., 700 ; *Lancelles v. Georgia*, 148 U. S., 537.

<sup>3</sup> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

*Prigg v. The Commonwealth of Pennsylvania*, 16 Pet., 539 ; *Jones v. Van Zandt*, 5 How., 215 ; *Strader et al. v. Graham*, 10 How., 82 ; *Moore v. The People of the State of Illinois*, 14 How., 13 ; *Dred Scott v. Sanford*, 19 How., 393 ; *Ableman v. Booth* and *United States v. Booth*, 21 How., 506.

SECTION. 3. <sup>1</sup> New States may be admitted by the Congress into this Union; but no new State shall be formed

or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

*American Insurance Company et al. v. Canter* (356 bales cotton), 1 Pet., 511; *Pollard's Lessee v. Hagan*, 3 How., 212; *Banner v. Porter*, 9 How., 235; *Cross et al. v. Harrison*, 16 How., 164.

<sup>2</sup>The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

*McCulloch v. State of Maryland*, 4 Wh., 316; *American Insurance Company v. Canter*, 1 Pet., 511; *United States v. Gratiot et al.*, 14 Pet., 526; *United States v. Rogers*, 4 How., 567; *Cross et al. v. Harrison*, 16 How., 164; *Muckey et al. v. Coxe*, 18 How., 100; *Gibson v. Chateau*, 13 Wall., 92; *National Bank v. County of Yankton*, 101 U. S., 129.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

*Luther v. Borden*, 7 How., 1; *Texas v. White*, 7 Wall., 700.

## ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be pro-

posed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

## ARTICLE. VI.

<sup>1</sup>All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

<sup>2</sup>This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Hayburn's case, 2 Dall., 409; *Ware v. Hylton*, 3 Dall., 199; *Calder and wife v. Bull and wife*, 3 Dall., 386; *Marbury v. Madison*, 1 Cr., 137; *Chirac v. Chirac*, 2 Wh., 259; *McCulloch v. The State of Maryland*, 4 Wh., 316; *Society v. New Haven*, 8 Wh., 464; *Gibbons v. Ogden*, 9 Wh., 1; *Foster and Elam v. Neilson*, 2 Pet., 253; *Buckner v. Finley*, 2 Pet., 586; *Worcester v. State of Georgia*, 6 Pet., 515; *Kennett et al. v. Chambers*, 14 How., 38; *Dodge v. Woolsey*, 18 How., 331; *State of New York v. Dibble*, 21 How., 366; *Ableman v. Booth and United States v. Booth*, 21 How., 506; *Sinnot v. Davenport*, 22 How., 227; *Foster v. Davenport*, 22 How., 224; *Haver v. Yaker*, 9 Wall., 32; *Western Union Telegraph Company v. Massachusetts*, 125 U.S., 530.

<sup>3</sup>The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Ex parte Garland, 4 Wall., 333.

## ARTICLE VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven, and of the Independence of the United States of America the Twelfth **In Witness** whereof We have hereunto subscribed our Names,

G<sup>o</sup>: WASHINGTON—

*Presidt. and Deputy from Virginia*

*New Hampshire.*

JOHN LANGDON

NICHOLAS GILMAN

*Massachusetts.*

NATHANIEL GORHAM

RUFUS KING

*Connecticut.*

WM. SAML. JOHNSON

ROGER SHERMAN

*New York.*

ALEXANDER HAMILTON

*New Jersey.*

WIL: LIVINGSTON

WM. PATERSON

DAVID BREARLEY

JONA: DAYTON

*Pennsylvania.*

B. FRANKLIN

THOS. FITZSIMONS

THOMAS MIFFLIN

JARED INGERSOLL

ROBT. MORRIS

JAMES WILSON

GEO. CLYMER

GOUV MORRIS

*Delaware.*

GEO : READ

RICHARD BASSETT

GUNNING BEDFORD Jun

JACO : BROOM

JOHN DICKINSON

*Maryland.*

JAMES McHENRY

DANL. CARROLL

DAN OF ST THOS JENIFER

*Virginia.*

JOHN BLAIR—

JAMES MADISON JR.

*North Carolina.*

WM. BLOUNT

HU WILLIAMSON.

RICHD. DOBBS SPAIGHT

*South Carolina.*

J. RUTLEDGE,

CHARLES PINCKNEY

CHARLES COTESWORTH

PIERCE BUTLER.

PINCKNEY

*Georgia.*

WILLIAM FEW

ABR BALDWIN

Attest

WILLIAM JACKSON *Secretary*

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE  
CONSTITUTION OF THE UNITED STATES OF AMERICA,  
PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGIS-  
LATURES OF THE SEVERAL STATES PURSUANT TO THE  
FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

## [ARTICLE I.]\*

Congress shall make no law respecting an establishment  
of religion, or prohibiting the free exercise thereof; or  
abridging the freedom of speech, or of the press; or the

\* The first ten amendments to the Constitution of the United States were  
proposed to the legislatures of the several States by the First Congress, on

right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*Terrett et al. v. Taylor et al.*, 9 Cr., 43; *Vidal et al. v. Girard et al.*, 2 How., 127; *United States v. Cruikshank et al.*, 92 U. S., 542; *Reynolds v. The United States*, 98 U. S., 145; *Eilenbecker v. Plymouth County*, 134 U. S., 31; *In re Rapier*, 143 U. S., 110.

## [ARTICLE II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

*Reynolds v. The United States*, 98 U. S., 145; *Presser v. Illinois*, 116 U. S., 252.

## [ARTICLE III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

## [ARTICLE IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Smith v. State of Maryland*, 18 How., 71; *Murray's Lessee et al. v. Hoboken Land and Improvement Company*, 18 How., 272; *Ex parte Milligan*, 4 Wall., 2; *Boyd v. The United States*, 116 U. S., 616.

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the 25th of September, 1789. They were ratified by the following States, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; Pennsylvania, March 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, November 3, 1791; and Virginia, December 15, 1791. There is no evidence on the journals of Congress that the legislatures of Connecticut, Georgia, and Massachusetts ratified them.



## [ARTICLE V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*United States v. Perez*, 9 Wh., 579; *Barron v. The City of Baltimore*, 7 Pet., 243; *West River Bridge Company v. Dix et al.*, 6 How., 507; *Mitchell v. Harmony*, 13 How., 115; *Moore, ex. v. The People of the State of Illinois*, 14 How., 13; *Murray's Lessee et al. v. Hoboken Land and Improvement Company*, 18 How., 272; *Dynes v. Hoover*, 20 How., 65; *Withers v. Buckley et al.*, 20 How., 84; *Gilman v. The City of Sheboygan*, 2 Black, 510; *Ex parte Milligan*, 4 Wall., 2; *Twitchell v. The Commonwealth*, 7 Wall., 321; *Hepburn v. Griswold*, 8 Wall., 603; *Miller v. United States*, 11 Wall., 268; *Legal Tender Cases*, 12 Wall., 457; *Pumpelly v. Green Bay Company*, 13 Wall., 166; *Osborn v. Nicholson*, 13 Wall., 654; *Ex parte Lange*, 18 Wall., 163; *Kohl et al. v. United States*, 91 U. S., 367; *McMillan v. Anderson*, 95 U. S., 37; *Pennoyer v. Neff*, 95 U. S., 714; *Davidson v. New Orleans*, 96 U. S., 97; *Railroad Company v. Richmond*, 96 U. S., 521; *United States v. Union Pacific Railroad Company*, 98 U. S., 569; *Sinking Fund Cases*, 99 U. S., 700; *Langford v. The United States*, 101 U. S., 341; *County of Mobile v. Kinback*, 102 U. S., 691; *Ex parte Wilson*, 114 U. S., 417; *Fort Leavenworth Railroad Company v. Howe*, 114 U. S., 525; *Boyd v. The United States*, 116 U. S., 616; *Mackin v. The United States*, 117 U. S., 348; *Arrowsmith v. Harmoning*, 118 U. S., 194; *Ex parte Bain*, 121 U. S., 1; *Parkinson v. United States*, 121 U. S., 281; *Spies v. Illinois*, 123 U. S., 131; *Sands v. Manistee River Improvement Company*, 123 U. S., 288; *Ro Bards v. Lamb*, 127 U. S., 58; *Missouri Pacific Railway Company v. Mackey*, 127 U. S., 205; *Freeland v. Williams*, 131 U. S., 405; *In re Ross*, 140 U. S., 453; *New Orleans v. New Orleans Water Works Company*, 142 U. S., 79; *Counselman v. Hitchcock*, 142 U. S., 547; *Nishimura Ekin v. The United States*, 142 U. S., 651; *Thomington v. Montgomery*, 147 U. S., 490; *Monongahela Navigation Company v. The United States*, 148 U. S., 312; *Paulsen v. Portland*, 149 U. S., 30; *Marchant v. Pennsylvania Railroad Company*, 153 U. S., 380; *Pittsburg, Cincinnati, Chicago, and St. Louis Railway Company v. Bachus*, 154 U. S., 421.

## [ARTICLE VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Ex parte Kearney, 7 Wh., 38; United States v. Mills, 7 Pet., 138; Baron v. City of Baltimore, 7 Pet., 243; Fox v. Ohio, 5 How., 410; Withers v. Buckley et al., 20 How., 84; Ex parte Milligan, 4 Wall., 2; Twitchell v. The Commonwealth, 7 Wall., 321; Miller v. The United States, 11 Wall., 268; United States v. Cook, 17 Wall., 168; United States v. Cruikshank et al., 92 U. S., 542; Callan v. Wilson, 127 U. S., 540.

## [ARTICLE VII.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

United States v. La Vengeance, 3 Dall., 297; United States v. Hudson, 7 Cr., 32; United States v. Coolidge, 1 Wh., 415; Bank of Columbia v. Oakley, 4 Wh., 235; Parsons v. Bedford et al., 3 Pet., 433; Lessee of Livingston v. Moore et al., 7 Pet., 469; Webster v. Reid, 11 How., 437; The Justices v. Murray, 9 Wall., 274; Edwards v. Elliott et al., 21 Wall., 532; Pearson v. Yewdall, 95 U. S., 294; McElrath v. The United States, 102 U. S., 426; Spies v. Illinois, 123 U. S., 131; Arkansas Valley Land and Cattle Company v. Mann, 130 U. S., 69; Scott v. Neely, 140 U. S., 106; Cates v. Allen, 147 U. S., 451.

## [ARTICLE VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Pervear v. Commonwealth, 5 Wall., 475.

## [ARTICLE IX.]

• The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

*Lessee of Livingston v. Moore et al.*, 7 Pet., 469.

## [ARTICLE X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

*Chisholm, ex., v. State of Georgia*, 2 Dall., 419; *Hollingsworth et al. v. The State of Virginia*, 3 Dall., 378; *Martin v. Hunter's Lessee*, 1 Wh., 304; *McCulloch v. State of Maryland*, 4 Wh., 316; *Anderson v. Dunn.*, 6 Wh., 204; *Cohens v. Virginia*, 6 Wh., 264; *Osborn v. United States Bank*, 9 Wh., 738; *Buchler v. Finley*, 2 Pet., 586; *Ableman v. Booth*, 21 How., 506; *The Collector v. Day*, 11 Wall., 113; *Claffin v. Houseman, assignee*, 93 U. S., 130; *Inman Steamship Company v. Tinker*, 94 U. S., 238.

## [ARTICLE XI.]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

*State of Georgia v. Brailsford et al.*, 2 Dall., 402; *Chisholm, ex., v. State of Georgia*, 2 Dall., 419; *Hollingsworth et al. v. Virginia*, 3 Dall., 378; *Cohen v. Virginia*, 6 Wh., 264; *Osborn v. United States Bank*, 9 Wh., 738; *United States v. The Planters' Bank*, 9 Wh., 904; *The Governor of Georgia v. Juan Madrazo*, 1 Pet., 110; *Cherokee Nation v. State of Georgia*, 5 Pet., 1; *Briscoe v. The Bank of the Commonwealth of Kentucky*, 11 Pet., 257; *Curran v. State of Arkansas et al.*, 15 How., 304; *New Hampshire v. Louisiana*, 108 U. S., 76; *New York v. Louisiana*, 108 U. S., 76; *Hagood v. Southern*, 117 U. S., 52; *In re Ayers*, 123 U. S., 443; *Lincoln County v. Luning*, 133 U. S., 529; *Haws v. Louisiana*, 134 U. S., 1; *Pennoyer v. McConaughy*, 140 U. S., 1; *Reagan v. Farmers' Loan and Trust Company*, 154 U. S., 362.

The eleventh amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Third Con-

gress, on the 5th September, 1794 ; and was declared in a message from the President to Congress, dated the 8th of January, 1798, to have been ratified by the legislatures of three-fourths of the States.

## [ARTICLE XII.]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other consti-

tutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The twelfth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Eighth Congress, on the 12th of December, 1803, in lieu of the original third paragraph of the first section of the second article; and was declared in a proclamation of the Secretary of State, dated the 25th of September, 1804, to have been ratified by the legislatures of three-fourths of the States.

### ARTICLE XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

*Dred Scott v. Sanford*, 19 How., 393; *White v. Hart*, 13 Wall., 646; *Osborn v. Nicholson*, 13 Wall., 654; *Slaughter-house Cases*, 16 Wall., 36; *Civil Rights Cases*, 109 U. S., 3.

The thirteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-eighth Congress, on the 1st of February, 1865, and was declared, in a proclamation of the Secretary of State, dated the 18th of December, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six States, viz: Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia.

## ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

*Crandall v. The State of Nevada*, 6 Wall., 35; *Paul v. Virginia*, 8 Wall., 168; *Ward v. Maryland*, 12 Wall., 418; *Slaughter-house Cases*, 16 Wall., 36; *Bradwell v. The State*, 16 Wall., 130; *Bartemeyer v. Iowa*, 18 Wall., 129; *Minor v. Happersett*, 21 Wall., 162; *Walker v. Sauvinet*, 92 U. S., 90; *Kennard v. Louisiana*, ex rel. Morgan, 92 U. S., 480; *United States v. Cruikshank*, 92 U. S., 542; *Munn v. Illinois*, 94 U. S., 113; *McMillan v. Anderson*, 95 U. S., 37; *Pennoyer v. Neff*, 95 U. S., 714; *Railroad Company v. Richmond*, 96 U. S., 521; *Davidson v. New Orleans*, 96 U. S., 97; *United States v. Union Pacific Railroad Company*, 98 U. S., 569; *Sinking Fund Cases*, 99 U. S., 700; *Strauder v. West Virginia*, 100 U. S., 303; *Virginia v. Rines*, 100 U. S., 313; *Ex parte Virginia*, 100 U. S., 339; *Missouri v. Lewis*, 101 U. S., 22; *Langford v. The United States*, 101 U. S., 141; *United States v. Harris*, 106 U. S., 629; *Pace v. Alabama*, 106 U. S., 583; *Bush v. Kentucky*, 107 U. S., 110; *Gross v. The United States Mortgage Company*, 108 U. S., 477; *Civil Rights Cases*, 109 U. S., 3; *Louisiana v. New Orleans*, 109 U. S., 285; *Hurtado v. California*, 110 U. S., 516; *Hager v. Reclamation District*, 111 U. S., 701; *Elk v. Wilkins*, 112 U. S., 94; *Foster v. Kansas*, 112 U. S., 201; *Head v. Amoskeag Manufacturing Company*, 113 U. S., 9; *Barbier v. Connolly*, 113 U. S., 27; *Provident Institution v. Jersey City*, 113 U. S., 506; *Soon Hing v. Crowley*, 113 U. S., 703; *Wurts v. Hoagland*, 114 U. S., 606; *Kentucky Railroad Tax Cases*, 115 U. S., 321; *Campbell v. Holt*, 115 U. S., 620; *Presser v. Illinois*, 116 U. S., 252; *Missouri Pacific Railroad Company v. Humes*, 116 U. S., 512; *Yick Wo v. Hopkins*, 118 U. S., 356; *Santa Clara County v. Southern Pacific Railroad*, 118 U. S., 394; *Philadelphia Fire Association v. New York*, 119 U. S., 110; *Schmidt v. Cobb*, 119 U. S., 286; *Hayes v. Missouri*, 120 U. S., 68; *Mugler v. Kansas*, 123 U. S., 623; *Pembina Mining Company v. Pennsylvania*, 125 U. S., 181; *Spencer v. Merchant*, 125 U. S., 345; *Dow v. Beidelman*, 125 U. S., 680; *Ro Bards v. Lamb*, 127 U. S., 58; *Missouri Pacific Railway Company v. Mackey*, 127 U. S., 205, also 210; *Powell v. Pennsyl-*

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The fourteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-ninth Congress, on the 16th of June, 1866. On the 21st of July, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress. Therefore, *Resolved*, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated the 28th of July, 1868, declaring that the proposed fourteenth amendment had been ratified, in the manner hereafter mentioned, by the legislatures of thirty of the thirty-six States, viz.: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866, (and the legislature of the same State passed a resolution in April, 1868, to withdraw its consent to it); Oregon, September 19, 1866; Vermont, November 9, 1866; Georgia rejected it November 13, 1866, and ratified it July 21, 1868; North Carolina rejected it December 4, 1866, and ratified it July 4, 1868; South Carolina rejected it December 20, 1866, and ratified it July 9, 1868; New York ratified it January 10, 1867; Ohio ratified it January 11, 1867, (and the legislature of the same State passed a resolution in January, 1868, to withdraw its consent to it); Illinois ratified it January 15, 1867; West Virginia, January 16, 1867; Kansas, January 18, 1867; Maine, January



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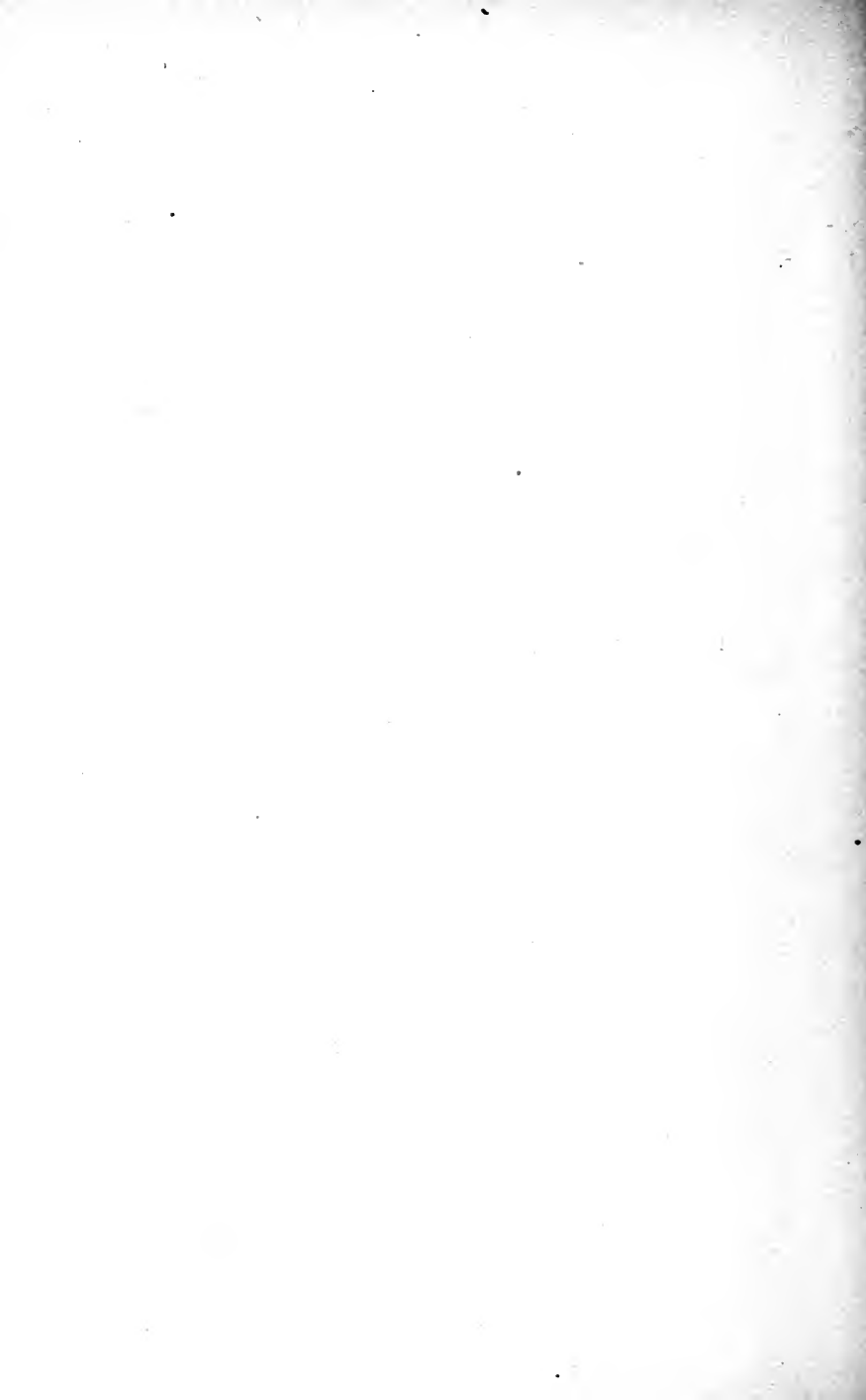
## ARTICLE XV.

**SECTION 1.** The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

**SECTION 2.** The Congress shall have power to enforce this article by appropriate legislation.

*United States v. Reese et al.*, 92 U. S., 214; *United States v. Cruikshank et al.*, 92 U. S., 542; *Neal v. Delaware* 103 U. S. 370; *Ex parte Yarborough*, 110 U. S., 651.

The fifteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Fortieth Congress, on the 27th of February, 1869, and was declared, in a proclamation of the Secretary of State, dated March 30, 1870, to have been ratified by the legislatures of twenty-nine of the thirty-seven States. The dates of these ratifications (arranged in the order of their reception at the Department of State) were: from North Carolina, March 5, 1869; West Virginia, March 3, 1869; Massachusetts, March 9–12, 1869; Wisconsin, March 9, 1869; Maine, March 12, 1869; Louisiana, March 5, 1869; Michigan, March 8, 1869; South Carolina, March 16, 1869; Pennsylvania, March 26, 1869; Arkansas, March 30, 1869; Connecticut, May 19, 1869; Florida, June 15, 1869; Illinois, March 5, 1869; Indiana, May 13–14, 1869; New York, March 17–April 14, 1869, (and the legislature of the same State passed a resolution January 5, 1870, to withdraw its consent to it;) New Hampshire, July 7, 1869; Nevada, March 1, 1869; Vermont, October 21, 1869; Virginia, October 8, 1869; Missouri, January 10, 1870; Mississippi, January 15–17, 1870; Ohio, January 27, 1870; Iowa, February 3, 1870; Kansas, January 18–19, 1870; Minnesota, February 19, 1870; Rhode Island, January 18, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870. The State of Georgia also ratified the amendment February 2, 1870.



# ANALYTICAL INDEX

## TO THE

# CONSTITUTION OF THE UNITED STATES

## AND THE

# AMENDMENTS THERETO.

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Shall not pass any bill of attainder, <i>ex post facto</i> law, or law impairing the obligation of contracts. ....	1	10	1	46
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## CHAPTER I.

### THE PROGRESS OF AMERICAN INDEPENDENCE AND ITS BASIS IN THE LAW OF ENGLAND.

§ 1. It seems proper in the beginning to pass in review the leading facts and events that occurred previous to the Revolutionary War which show or tend to show the growth and power of the spirit of independence, the influence of those events in that memorable struggle, and also to consider the foundation in law on which the Declaration was placed by its authors and defenders.

In passing I hope to disabuse the public mind in some degree of the degrading error that the rate of taxation, whether burdensome or light, imposed by the British Parliament had any considerable part in producing the Revolutionary War.

I trust that I may also do something in aid of a correct understanding of the theory of representation which was maintained by our ancestors in their contest with the King and Parliament of Great Britain. In pursuing this plan I purpose to note some of the facts in our colonial history calculated to illustrate our legal relations to the mother country, which I assume were relations of equality and not of political inferiority to the people of England.

§ 2. It is an accepted opinion, common if not general, that as long as the British Parliament legislated wisely for the American Colonies the right was not questioned, and that the oppressive character of the Stamp Act and the tax acts from 1764 to 1774 led to the Declaration of Independence. The character of those acts contributed to the formal Declaration of July 4, 1776, but the principles of that Declaration had been before and often asserted. Moreover, the right of

Parliament to legislate for the Colonies had been constantly denied from the first, although the authority of the king had never been questioned until he allied himself with the Parliament and aided that body in establishing its jurisdiction over America. The Declaration was against the king, and one of the facts submitted to a candid world was this: "He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws: giving his assent to their acts of pretended legislation."

§ 3. The common consent of men accords to the Declaration of American Independence the first place among the events which followed the discovery of this continent.

The adventurers from the South of Europe of the fifteenth, sixteenth, and even of the seventeenth centuries sought for fields of gold beneath skies of perpetual summer.

Of hardy enterprise there was but little, and of faith in the organization of great States there was none. Columbus had been a beggar at the foot of thrones for the necessary means for a voyage of discovery, and when the existence of the new world had been demonstrated a century passed before England established a single colony.

Even then the colonists went forth to lay the foundations of an Empire without the benediction of the mother country. It seems to have been the chief object of the king to secure a portion of the products of the mines to his own use and for this he stipulated in the charters which he granted.

The most erroneous ideas existed concerning the extent and character of this continent. The royal charters were widely spread over vast territories from sea to sea and the early maps illustrate the ignorance of the settlers. At the commencement of the Revolutionary War the territory east of the Alleghanies and the Great Lakes had been explored, but the vast region to the West was unknown.

§ 4. Colonization, as the basis of new and great States, was not the original idea of any European government, and the



Colonies had their origin in the cupidity of rulers, the hope of gain through new channels of commerce and the unquenchable thirst for freedom in political and religious affairs. Of all the Colonies which constituted, finally, the thirteen States of this Union, one only, Georgia, received the aid of the Government.

The others were permitted, not established, oppressed, indeed, rather than encouraged. Massachusetts and Virginia seem to have discerned early the future greatness of America and they laid the foundations of its Empire when they asserted their political principles or resisted oppression. Said Dr. Franklin, in 1760, "I have long been of opinion that the foundations of the future grandeur and stability of the British Empire lie in America; and though like other foundations they are low and little now, they are nevertheless broad and strong enough to support the greatest political structure human wisdom ever yet erected."

It was upon this idea of the future of England and America that Dr. Franklin acted when ten years later he sought to avert a separation through a system of representation in the British Parliament. Independence had a slow growth. For a century before it was declared it was predicted by a few, it was feared by some, but it was not even imagined as a possible event by the masses of England and America. The remote causes of American Independence are to be found in the recognized principles on which the British Government rested and in the origin and nature of the charters granted to the Colonies.

§ 5. In 1764 when the open contest commenced which ended in Independence, England had been a limited constitutional monarchy for five and a half centuries.

In those twenty generations by the labor, blood and sacrifices of her nobles and commons she had established a system or constitution which marked the limits of royal power, prescribed the duties of those in authority and measured and asserted the rights of the subject. Not always to be

sure had the rights of the people been regarded, but even under the most tyrannical of the Tudors and profligate of the Stuarts they were remembered and in some manner asserted. As we shall see in America, so it was in England, oppression was the parent of liberty. Said the *New York Mercury* of 1764, "History does not furnish an instance of a revolt begun by the people which did not take its rise from oppression."

§ 6. The same year that the English nobles extorted *Magna Charta* from their monarch a decree was obtained in the fourth Council of Lateran that "all heretics should be delivered over to the civil magistrate to be burned." The year 1215 is marked in the annals of freedom and in the annals of despotism. By the grant of *Magna Charta* the natural liberties of England obtained a degree of security and a basis was laid for the legal argument of our Fathers in support and defence of the Revolutionary War. Until this epoch the Papal Power had punished heresy with spiritual weapons only, but now it adopted the policy of heathen emperors and introduced a system of persecution which during many years dishonored the annals of the Catholic and Protestant Churches. Happily those days are gone and their like can never again appear. But it might then have been doubted whether the power of *Magna Charta* for good was equal to that of the decree of the Council for evil. Time has solved the doubt in favor of freedom. *Magna Charta* is the foundation of the British Constitution and the precedent to which all may safely appeal who inherit, as a birthright, the principles of that Constitution. It is well, however, to observe that the British Constitution, *Magna Charta* and all, rest upon the theory that every power resided originally in the monarch, and that the grants made to the people are but so many limitations of his prerogatives, while the modern American theory vests all power in the people who by their constitutions delegate such authority to their agents as may be exercised, safely, by them.

The principles of the two systems are opposed to each other, most strictly, but as applied by the people of the two countries they tend to the same result, — Popular Liberty.

It is the theory of the American system that the people retain in their own hands every power which might be used to deprive them of any natural right. Under the British system the people have sought to annul every prerogative which might be used against their liberties.

§ 7. By *Magna Charta* King John agreed to have a common council of the kingdom to “assess an aid, or to assess a scutage,” and the Declaration of Rights of 1688 asserted “that levying money for or to the use of the crown by pretence of prerogative without grant of Parliament for longer time or in any other manner than the same is or shall be granted, is illegal.”

These two acts, one a grant of privileges and the other a Declaration of Rights, were acknowledged by the monarchs and asserted by the people at various times and they were the chief security of every British subject against taxation without the consent of his representative. Our ancestors claimed to be British subjects although not living within the Realm. This claim they supported by the language of their charters and by a reference to the relations of the Colonies to the sovereigns and to the Parliament of England for the period of a century and a half. The charter of Massachusetts provided that the inhabitants of the Colony and their children should have and enjoy all the liberties and immunities of free and natural subjects “as if they and every of them were born within the Realm of England.”

Thus sustaining their birthright as British subjects they claimed the benefit of the principle of the British Constitution that there could be no taxation without representation. The ministry and the crown lawyers denied the propriety of a literal interpretation of the pledge contained in the charter and they contended that it was no more of a fiction to assert that America was represented by the English members than

to say that Manchester or Birmingham was represented by the member for Malton. "Why," replied Otis, "why ring everlasting changes to the colonists on them? If they are not represented they ought to be. Every man of a sound mind should have his vote."

§ 8. Of all the leading men of America, Otis and Franklin, only, thought it desirable or practicable for the Colonies to be represented at Westminster. The popular will inclined to the doctrine of the charters, which as interpreted by the people, secured to each Colony a representative assembly in which the power of taxation was vested, exclusively. Resting upon their rights as British subjects the colonists claimed that America could be taxed only when and where she was represented, and that she could be represented only in her colonial assemblies. Their unanswerable argument in fact, though not in words, was this: "If we are Britons we are entitled to the rights of Britons and we cannot be taxed by a body in which we are not represented. If we are not British subjects then plainly we are beyond the jurisdiction of either king or parliament." But they went still further, and while they claimed that they were the subjects of the king in his capacity as the hereditary ruler of the British Empire, they denied the jurisdiction of Parliament in all cases whatsoever. It is true that for a time they asserted a distinction between internal and external taxation, but this distinction yielded, finally, to the force of the principle for which they were contending. Otis told the people of Boston that the distinction between inland taxes and port duties was without foundation, and "that the merchants were fools if they submitted any longer to the laws restraining their trade, which ought to be free."

§ 9. There were three sorts of government in the Colonies, proprietary, royal and charter. The governments of Massachusetts, Rhode Island and Connecticut were of the latter sort and their charters were treated by the colonists as compacts between the king and his successors on the one part and the governors and their successors on the other part.

The provisions of the charters were the terms of the respective compacts. By these terms the Parliament had no power over the Colonies either with reference to political privileges or to the civil rights and duties of the citizens or subjects. In fine the Colonists went so far as to declare that they were unable to understand how the king or the English nation acquired any title to the lands described in the charters. They claimed that the title derived from the natives, sometimes by the Colonies in their political character, and sometimes by the colonists individually, was the better title, but they maintained that if any title ever vested in the nation it was one of the prerogatives of the sovereign. And this doctrine is supported by the best writers upon the Constitution of England. According to the feudal tenure the king was the original proprietor of all the lands of the kingdom, and by that tenure he might dispose of them at his sovereign will.<sup>1</sup> In truth a large part of the English nobility held their lands under royal grants precisely as the colonists held theirs. It can be asserted with confidence that the right of the mother country over the unoccupied lands of America, whatever that right was, resided in the king, and it followed, consequently, that the grants made by the monarchs to the colonists were in strict conformity to the theory of and practice under the English Constitution previous to and during the seventeenth century.

§ 10. On one occasion King James the First maintained his prerogatives against the claim of Parliament. The controversy arose upon a bill introduced into the House of Commons for regulating the American fisheries. "America," said the king, "is not annexed to the realm nor within the jurisdiction of Parliament; you have therefore no right to interfere." This doctrine so announced by the king became

<sup>1</sup> Lord Mansfield says "Jamaica from the very settling was an English Colony, *who* [sic] under the authority of the King planted a vacant island belonging to him in right of his crown." *Campbell v. Hall, Cowper's Rep.* I. 204.

the basis of the logical and legal argument made by Samuel Adams in the name of the House of Representatives, of Massachusetts, in its memorable controversy with the Provincial Governors between the years 1764 and 1774. It is not to be understood, however, that this view was asserted or even accepted by all the Colonies, but there are very few facts in the history of New England inconsistent with the claim of independence of Parliament. The jurisdiction of the Parliament, said the New England Colonies, is confined to the English Realm. America is not within the Realm. As the king granted to you the right of legislation for the Realm of England, so has he granted to us the right of legislation within and for our respective Colonies in America. As the king has granted to you lands within the Realm by the feudal tenure, so has he granted to us lands without the Realm and by the same tenure. As the conditions on which you hold your lands are expressed in *Magna Charta* the charter of British Liberties, so the conditions on which we hold our lands are expressed in our several charters which are the charters of American Liberties. As the king has agreed that he would not levy an aid nor assess a tax upon his subjects within the Realm without your consent, so he has agreed that he would not impose a tax upon his subjects in America without their consent in general assembly met. As the king has and had the right to cede a conquered territory without the consent of the Lords and Commons, so he had the right to convey to us the region which was acquired without any expense of blood and treasure to his British subjects. In fine that America is a part of the dominions of the king of England and his successors and owes allegiance to him and them, but it is no more subject to the people and Parliament of England than the people and Parliament of England are to the king's Colonies in America.

§ 11. These doctrines were not announced early nor perhaps ever as they may now be presented, but most of the

Colonies, when not overborne by arbitrary power, were in fact independent of Parliament. The Massachusetts Colony in one or two instances re-enacted a law of Parliament when it became apparent that it would be enforced. Thus they protested against the doctrine that Parliament had a right to legislate for the Colony. As early as 1634 the General Court of Massachusetts resolved that "none but the General Court hath power to make and establish laws, nor to elect and appoint officers, as also to set out the duties and powers of said officers." And again, that "none but the General Court hath power to raise money and taxes and to dispose of lands, viz., to give and confirm proprietaries." Says Winthrop in 1640, "Some of our friends wrote to us advising to send over some one to solicit for us in Parliament, giving us hopes that we might obtain much, but consulting about it we declined the motion for the consideration that if we should put ourselves under the protection of Parliament we should be subject to all such laws as they should make, or at least to such as they might impose on us; in which, if they should intend our good, yet it might prove very prejudicial to us."

§ 12. In 1646 Massachusetts sent deputies to Acadia to make a treaty with D'Aulney the French Governor of that Province. The instructions say, "We therefore the governor, deputy governor, magistrates, and deputies, making the General Court of Boston, *wherein the supreme power and authority of this jurisdiction resideth.*"

§ 13. In 1636 the Plymouth Colony resolved that no law was valid which had not received the assent of the body of freemen, "which is," said they, "according to the free liberties of the free born people of England."

§ 14. In 1650 the Legislature of Maryland passed an act against raising money without the consent of the Assembly. The Assembly of Rhode Island re-enacted the words of Magna Charta; Massachusetts, New York, and New Jersey asserted that they "could be touched by no act but of their own making," and the Assembly of New Jersey declared that the

custom house duties were illegal and unconstitutional because imposed without its consent.

§ 15. In 1661 the General Court of Massachusetts published a Declaration of Rights which was only less than a Declaration of Independence. They claimed the right to choose their own Governor, to admit freemen, to set up all sorts of officers, to exercise all powers, legislative, executive and judicial, to defend themselves by force of arms, to reject any royal or parliamentary imposition, prejudicial to the country and contrary to any just act of colonial legislation.

Again in 1678 the Colony declared that "the Acts of Navigation were an invasion of the rights and privileges of the subjects of His Majesty in the colony, they not being represented in Parliament."

"The laws of England," said they, "do not reach America."

§ 16. In 1765 the first Congress of the American Colonies declared "that it is inseparably essential to the freedom of a people and the undoubted rights of Englishmen that no taxes be imposed on them, but with their own consent, given personally or by their representatives; that the Colonies are not and from their local circumstances cannot be represented in the House of Commons in Great Britain; that the only representatives of the people of these Colonies are persons chosen therein by themselves, and that no taxes ever have been or ever can be constitutionally imposed upon them, but by their respective legislatures."

In the same year said John Adams, "Be it remembered that liberty must at all hazards be supported. We have a right to it derived from our Maker." As the Colonies began so they ended — firm in their attachment to the principles of self-government. Nor will it be contended by any reader of their history that the questions discussed in the revolutionary contest were new questions. Their policy was consistent from first to last. They acknowledged their allegiance to the King of Great Britain, but never for a moment did they



admit the supremacy of the British Parliament. This position was announced, most distinctly, in the Declaration of Rights and Liberties adopted by Congress October 14, 1774, in which it is said "that the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and the several charters and compacts have the following rights to wit: The right to life, liberty and property, — to the immunities of free and natural born subjects within the realm of England, — the exclusive right of taxation and the inestimable privilege of being tried by the peers of the vicinage according to the common law of England." They also declared that their rights had been violated by the presence of a standing army without their consent, and by the repeated attempts of Parliament to exercise jurisdiction over them. This manifesto was typical of the Declaration of Independence.

§ 17. Thus from the system of feudalism were deduced those doctrines and principles of liberty which gave to the Colonies an historical, moral and legal claim to their independence, and it is also to be seen that the oppressions of the British king and Parliament led to the dissolution of the union with England and the organization of the American Republic. But there were men who rested not in the compact with kings, nor had faith in the arbitrary line between prerogative and popular rights. Said James Otis, with the voice of inspiration: "Liberty is the gift of God and cannot be annihilated. Old Magna Charta," said he, "was not the beginning of all things, nor did it rise on the borders of chaos out of the unformed mass. A time may come when Parliament shall declare every American charter void, but the natural, inherent and inseparable rights of the colonists will remain, and whatever becomes of charters can never be abolished till the general conflagration."

§ 18. The attachment of the people to the crown was sincere, as sincere as their hostility to the claims of Parliament.

Said Franklin, "No people were ever known more truly

loyal, and universally so as to their sovereigns; the Protestant succession in the House of Hanover was their idol." Said Massachusetts a century before the bonds of union were broken finally, "Let our government live, our patent live, our magistrates live, our laws and liberties live, our religious enjoyments live, so shall we all have yet further cause to say from our hearts, let the king live forever."

The cause of America was the cause of mankind, and by wonderful forethought, perseverance and forbearance the cause was preserved for one hundred and fifty years until it was established finally by the Declaration of Independence.

§ 19. If in any generation our fathers had faltered in their support of the principles of liberty, or if at any time they had yielded to the claims of England, the revolution would have lost the legal and moral support derived from a long and consistent defence of popular rights. During all that period the Colonies were charged with aiming at independence, and a few men no doubt saw the future greatness of America.

With them the union with England would cease to be a necessity. Mr. Comptroller Weare in a letter to a nobleman, written, it is supposed, about the year 1760, said of America, "Nor can the inhabitants fail of sufficient resources within themselves, when they shall be unanimously disposed to attempt independency. The people are collected from the several quarters of Europe and its arts and manufactories are daily and successfully introduced by them. The Atlantic Ocean washes nearly two thousand miles of their shore, and a communication is opened by vast lakes and many navigable rivers into an enormous continent, whence human industry will doubtless in time know how to draw all that may be farther wanting to commerce which from such a situation may well be extended throughout the world." And again he predicts that a thousand leagues distance from the eye and strength of the government will suggest to a people accustomed to more than British liberty the thought of set-

ting up for themselves; and that every principal power in Europe will countenance a defection which whenever it happens must necessarily involve all the West India Islands. And he also expresses a fear that unless a different policy be adopted the northern Colonies ripened by a few, a very few, more years to maturity, will, agreeably to nature's ordinary laws, drop off from that stock whence they originally sprung.

It cannot be doubted that it then appeared to the statesmen of England that the Colonies aimed at independence, and the fear of this result was the origin of the effort to subject them to the authority of Parliament.

§ 20. When we consider the distance of the Colonies from the mother country, the delays and perils of navigation in sailing vessels, the population and resources of the Colonies in 1760, and when we consider the experience of the colonists in Indian warfare and the hardships of frontier life, it would now seem that wisdom should have dictated an adjustment of the controversy by which the Colonies would have been connected with the Realm only by their allegiance to the crown.

The time had not arrived, however, when those who were accustomed to the exercise of power were willing to yield it to argument or to the demands of those who claimed by natural right.

§ 21. For many years previous to 1770 the British Government maintained a spy in America named Chalmers. In one of his letters he asserts that the Colonies had a settled purpose to acquire direct independence throughout every reign from the epoch of the British revolution in 1688. Again he writes that in the time of Governor Winthrop the statute and common laws of England were no more regarded in Massachusetts than in Germany and France. Nor is his statement altogether false though tainted with prejudice when he says, Massachusetts "has extended her jurisdiction over the provinces of New Hampshire and Maine, upon such pretences as power will always find; established a mint at Bos-

ton, which is everywhere erected by sovereignty alone ; and entered into treaties with foreign nations *who* [sic] sought her assistance since their weaker plantations feared her power."

§ 22. One Major John Child published a pamphlet in 1647 called "*New England's Jonas Cast up in London.*"

Speaking of Winslow who was then the agent of Massachusetts in England, Child said: "Mark, reader, his great boasting that they are growing into a nation ; high conceits of a nation breed high thoughts of themselves, which make them usually term themselves a state ; call the people there their subjects ; unite four governments together without any authority from the king and parliament, and then term themselves the United Colonies."

In 1711 Governor Hunter, of the New York Province, wrote thus: "Now the mask is thrown off : — The delegates have called in question the Council's share in the Legislature, trumped up an inherent right, declared the powers granted by His Majesty's Letters Patent to be against law and have but one short step to make towards what I am unwilling to name."

The London Board of Trade, established to check the spirit of independence, declared that "the inhabitants are endeavoring to wrest the small remains of power out of the hands of the crown and to become independent of the mother country."

§ 23. On the other hand the colonists denied with spirit the justness of these attacks upon their loyalty. The Congress of 1774 said in their address to the people of England: "You have been told that we are seditious, impatient of government and desirous of independency. Be assured that these are not facts, but calumnies." But the real issue was avoided. The British Government was engaged in the work of subjecting the Colonies to the jurisdiction of Parliament, while the Colonies were denying and evading that jurisdiction while they asserted their loyalty to the sovereign ; and it was only

when the king lent himself to the policy of parliamentary supremacy that the colonists withdrew their allegiance to the crown.

By observing closely the principles on which the contest rested it will be seen that the acts of the colonists, which were construed by the British agents and ministry as acts of independence, were but the natural results of the governments that the colonists had set up and which, in their opinion, were warranted by the charters that the sovereigns had granted.

They legislated for America, but at the same time they acknowledged their allegiance to the king; but this recognition was no evidence of a purpose to submit to the authority of Parliament. Naturally, however, the advocates of parliamentary supremacy charged the Colonies with aiming at independence.

§ 24. We ought also to consider that from 1620 to 1770 a great change took place in England.

In the first era the House of Commons was destitute of authority comparatively. In the reigns of Henry the Eighth and of Elizabeth it had struggled for existence, but in the time of George the Third it had acquired the chief power of the Realm. In the latter period the monarch had lost many of his prerogatives, some by a formal surrender, some by the Act of Settlement of 1688, and others had been silently relinquished from respect to the opinions of the people. We are to consider also that the opportunities for transatlantic communication were less frequent than they now are, and that neither party had an interest in seeking or making explanations while an issue could be avoided. From 1630 to 1760 each party pursued its own policy, not, however, without many and serious conflicts; but the extension of the colonial system, by the acquisition of Canada, precipitated events and compelled England to enforce its pretensions at any cost. Some of the writers of that day maintained that the annexation of Canada tended to the independence of the whole

body of the American Colonies, while others asserted that the politic French minister, Vergennes, had a purpose of producing that result when he assented to the cession.

Dr. Franklin felt obliged to interfere, and with his accustomed ingenuity he refuted the alarmists, but the result showed that for once the philosopher was in the wrong. Dr. Franklin was a moderate man in his political opinions and he did not come early nor hastily into the plan of independence. He thought that England, when hard pressed, would grant a right of representation in the imperial parliament, and this concession would have been satisfactory to him, although the arrangement would not have been accepted by the mass of his countrymen. It happened, however, that as early as 1765 he had doubts whether England would make any concessions, and in October, 1775, he regarded a separation as inevitable.

The controversy was further embarrassed by the manufacturing and commercial interests of the Colonies. Laws for the regulation of commerce were classed as external, and although the Colonies did not concede to Parliament the right to impose customs duties, they did submit to such impositions for periods of time and that without protest. Many of the laws of Parliament were, however, disregarded. Manufactures were encouraged by local legislation, regulations that tended to promote commerce were adopted, differential duties were laid in South Carolina, and shipbuilding was so encouraged and practised in the northern Colonies that the carpenters upon the Thames complained to the government. Friends of America replied that the carpenters might as well complain of Bristol or Plymouth in England, and thus the matter ended.

§ 25. At the close of the French war England entered systematically upon a policy whose object was the establishment of the supremacy of Parliament over the Colonies of North America. For one hundred and thirty years this supremacy had been denied whenever the claim was presented. In that

time manufactures and commerce, although borne down by the weight of legislative restrictions, had so increased as to arrest the attention of the ministry and the Board of Trade, and excite the prejudices of the laborers upon the Thames and in the manufactories. The population of the thirteen Colonies then estimated at two and a half million had doubled by natural increase every twenty-five years, and it was then certain that it would be augmented largely by immigration from Europe.

This population was better fed and better clothed than the corresponding classes in England. The inhabitants of the Colonies had acquired great experience in the Indian wars, the siege of Louisburg, and the invasion of Canada. Their bravery was unquestioned. The future greatness of America had been predicted, and its natural resources had in a degree been unfolded.

England was burthened with debt and she thought that America might be compelled to contribute to its payment. The first question was this: Has Parliament a right to legislate for America? An affirmative answer suggested a second: What shall be the character of that legislation? In regard to the first question it ought not to have been expected that *ex parte* opinions, whether accompanied by a show of power or not, would lead to an amicable adjustment of the controversy. The only ground of hope was in negotiation and this appears not to have been thought of. England proceeded to legislate and upon the question of policy she made a most fatal mistake. With sole reference to her own interests she should have exercised the power that she assumed in the least offensive way. She should have so legislated that in equity no issue could have been made with her acts. On the contrary, guided, apparently, by an insensate lust of power she passed laws which would have kindled rebellion if the right of Parliament had been undisputed. For the purpose of aiding the officers in the collection of the revenue an old and obsolete law was revived under which writs, called Writs of Assistance, were granted.

§ 26. By these writs the agents of the government were empowered to search ships, shops, houses and stores. They were in fact general search warrants. The first application was from the collector of the port of Salem, Massachusetts. The Court hesitated. The merchants employed Thatcher and James Otis to resist the application. The writ was granted, but the speech of Otis so excited the people that John Adams, fifty years afterwards, declared that "American Independence was then and there born." In the series of offensive laws first came the Stamp Act, then a declaration that Parliament had a right to legislate for the Colonies in all cases whatsoever, then the act for shutting up the Port of Boston, then the act for altering the charter and government of Massachusetts Bay, an act for the better administration of justice, an act to establish the Roman Catholic religion in the Province of Quebec, an act for quartering the army upon the people, and various acts for raising a revenue.

§ 27. The Stamp Act was met by marked opposition in all the Colonies, and in some of them the people adopted measures of injustice and violence.

It was determined on all hands that the stamps should not be landed, and that no one should hold the office of agent. Those who accepted were compelled to resign. It was in vain that these officials claimed exemption from all responsibility for the existence of the statute, or that they set forth as an excuse that if they did not perform the service other persons, less acceptable, would be appointed in their places. The people's ears were closed, there was no alternative but resignation.

In New York a gallows was erected in the park of the present City Hall and on it Governor Colden was hung in effigy; handbills were circulated warning those who sold or used stamped paper that their persons, houses and effects were in peril, and the house of Major James, the commander of the King's Artillery, was sacked by the mob and the colors of his regiment were carried away by the excited crowd.



Finally the stamp agent resigned and the stamps were delivered to the mayor and corporation of the city of New York, with the advice of His Majesty's Council, unanimously given, and the concurrence of the commander-in-chief of the king's forces.

In Boston the supporters of the ministry and of the Stamp Act were hung in effigy on a tree afterwards known as "Liberty Tree" which stood at the corner of Essex and Washington Streets. Oliver, the Secretary of the Province and stamp distributor, was frightened into resignation. Jonathan Mayhew, the minister of the West Church, preached a violent sermon against the Stamp Act and its supporters, and the next day the house of the Governor was broken into and its contents were destroyed.

Apparently the public sentiment condemned these violations of law and order, but the rioters, though known, were suffered to go unpunished.

The nature of the opposition to the Stamp Act is illustrated by the proceedings in Connecticut. Jared Ingersoll was appointed Stamp Master, and, immediately, he was required to resign. A friend, when endeavoring to conciliate the people, said, "Had you not rather that these duties would be collected by your brethren than by foreigners?"

"No, vile miscreant, indeed we had not," said one; "if your father must die is there no defect in filial duty in becoming his executioner, that the hangman's part of the estate may remain in the family?" "If the ruin of your country is decreed are you free from blame in taking part in the plunder?"

"The act is so contrived," said Ingersoll, "as to make it your interest to buy the stamps. When I undertook the office I intended a service to you."

"Stop advertising your wares until they come safe at market," he was answered. "The two first letters of his name," said one, "are those of the traitor of old. It was

decreed our Saviour should suffer; but was it better for Judas Iscariot to betray him, so that the price of his blood might be saved by his friends?"

After much equivocation and with the fear of death upon him Ingersoll shouted *Liberty and Property* three times, and then resigned his office. The mob spirit evoked by the Stamp Act soon subsided and a calm determined purpose of resistance took its place. Surrounded by these violent and exciting scenes the dejected ones said, "North American Liberty is dead." "She is dead," said those of more faith, "but happily she has left one son, the child of her bosom prophetically named Independence, now the hope of all when he shall come of age."

"I am clear on this point," said Mayhew, "that no people are under a religious obligation to be slaves, if they are able to set themselves at liberty."

§ 28. This was in 1765 and from that time forth the spirit and purpose of independence animated and controlled the representative men and the organs of public sentiment in every part of the country. It was during the existence of the Stamp Act and pending the measures of oppression which followed its repeal, that declarations were made and plans were adopted of the greatest importance to the cause of American Independence.

§ 29. It was then that Patrick Henry, speaking for the Assembly of Virginia, declared "that every attempt to vest the power of taxation in any person or persons whatsoever, other than the said Assembly, has a manifest tendency to destroy British as well as American freedom;" that he proposed by resolution that the Colony of Virginia be immediately put into a state of defence; and that a committee should be appointed to prepare a plan for embodying, arming and disciplining such a number of men as may be sufficient for that purpose; that in the memorable debate on the resolution, in the language if not with the spirit of prophecy, he declared it vain to indulge the fond hope of peace and reconciliation,

that an appeal to arms and to the God of Hosts was all that was left. It was then that John Morin Scott of New York said if the mother country deny to the Colonies the "right of making their own laws and disposing of their own property by representatives of their own choosing then the connection between them ought to cease and sooner or later it must inevitably cease;" that the Sons of Liberty of the City of New York as early as the seventh day of January, 1766, forecast the American Union in the declaration that "there was safety for the Colonies only in the firm union of the whole;" that the Assembly of New York declared that that "colony lawfully and constitutionally has and enjoys an internal legislature of its own, in which the crown and the people of this colony are constitutionally represented, and the power and authority of the said legislature cannot lawfully or constitutionally be suspended, abridged, abrogated, or annulled by any power, authority, or prerogative whatsoever." It was then that the committee of one hundred of the City of New York upon the receipt of the news of the massacre on Lexington Green resolved "that all the horrors of civil war would never compel America to submit to taxation by authority of Parliament;" that the Assembly demanded "exemption from the burthens of ungranted, involuntary taxes as the grand principle of every free State," and as "without such a right vested in the people themselves there can be no liberty, no happiness, no security." It was then that Mr. Jefferson said, "We want neither inducement nor power to declare and assert a separation; we are reduced to the alternative of choosing an unconditional submission to the tyranny of irritable masters or resistance by force;" that the county "of Hanover, Virginia, instructed its delegates to assent to such measures as would produce the hearty union of all their countrymen and sister colonies;" that William Hooper, of North Carolina, early in 1774 declared that "the Colonies are striding fast to independency and will ere long build an empire on the ruins of Britain, will adopt its constitution

purged of its impurities, and from an experience of its defects, will guard against those evils which have wasted its vigor and brought it to an untimely end;" that the same State, the 12th day of April, 1776, empowered its delegates to "declare independency." It was then that Joseph Hawley of Massachusetts asserted that "independence was the only way to union and harmony;" that General Greene in 1775 recommended a Declaration of Independence; that Samuel Adams said, "I am perfectly satisfied of the necessity of a public and explicit Declaration of Independence;" that the press of Philadelphia declared that "none in this day of liberty will say that duty binds us to yield obedience to any man or body of men, forming part of the British Constitution, when they exceed the limits prescribed by that Constitution; that the Stamp Act is unconstitutional and no more obligatory than a decree of the Divan of Turkey." It was then that the town of Boston said, — and may their words be remembered, — "We are not afraid of poverty, but we disdain slavery;" that the county of Suffolk in 1774 resolved, "that no obedience is due from this province to either or any part of the obnoxious acts;" that Middlesex, speaking for the men of Lexington, Concord and Bunker Hill, said "we are sensible that he can never die too soon who lays down his life in support of the laws and liberties of his country;" that the Continental Congress of 1774 sent forth its immortal remonstrances, memorials, manifestoes and addresses to the king, to Parliament, to the people of England, to the people of Ireland, to their brethren of Canada and to the Colonies of America; that ancient hostilities were forgotten, that local barriers were broken down, the spirit of union fostered and the Colonies made one in purpose and in destiny; and, finally, that the formal and authoritative Declaration of Independence introduced an era of Freedom, not for this country and people only, but ultimately, for all who speak the English language.

§ 30. Thus does it appear from this array of facts, gathered

from an era of a century and a half, that the Independence of the American Colonies had a slow growth, but its progress was perceptible and from the year 1764 there could have been no ground for doubt as to the ultimate result. When the Declaration came the country was prepared to give it a substantial if not a united support.

§ 31. The controversy and the contest were carried on by young men and by men in the meridian period of life. Jefferson was in his thirty-fourth year. Washington was his senior by only eleven years, and it is said of the signers of the Declaration that their average age was less than forty years.

§ 32. It is a remarkable but well-authenticated phenomenon in human history that when the minds of many men are directed to one subject they often arrive at similar results and find similar modes of expression. This peculiarity has been observed in purely scientific researches, and it is more probable that it should have existed in the controversy preceding the independence of these Colonies. It is not a marvel then, nor in disparagement of Mr. Jefferson or of the Congress of 1776, that the historian is compelled to admit that the Declaration of Independence is but the last and best expression of the sentiment and purposes of Colonial America.

The rights and grievances of the Colonies had been set forth by the Congress of 1774; the doctrine of the equality of all men, not as a theory, merely, but in the substance of their natural, political rights, had been enunciated by Otis; and the citizens of Mecklenburg, North Carolina, had anticipated the Declaration of Jefferson and in some respects its exact language, and yet there is no reason to believe that the substance of the document was known to any member of Congress and there is much evidence that neither Mr. Jefferson nor any one of his colleagues of the committee was aware of its existence.

§ 33. The great merit of the Declaration of Independence

is in this: That it asserted with unrivalled precision and power what the country had resolved and what it was prepared to maintain. It proclaimed the natural rights of men; it embodied the history of Colonial America and it set forth the nature of the oppressions that the colonists had endured, the sacrifices they had made, the loyalty they had exhibited, their poverty and forbearance all crowned by a statement of their purposes in the future. The Colonies were represented by Mr. Jefferson of Virginia, Mr. Robert R. Livingston of New York, John Adams of Massachusetts, Dr. Franklin of Pennsylvania, and Roger Sherman of Connecticut. The draft, as prepared by Mr. Jefferson, was as remarkable for what was omitted finally, upon the suggestion of Georgia and South Carolina, as for what was preserved. As prepared by Mr. Jefferson and agreed to by the Committee, the King of Great Britain was denounced for the crime of perpetuating the traffic in African slaves. In the year 1774 North Carolina resolved not to import nor purchase slaves: the County of Hanover, Virginia, had pronounced the African trade in slaves "most dangerous to the virtue and welfare of the country;" the Congress of 1774 had discountenanced the trade in slaves, and James Otis, with nervous eloquence, had denounced the whole system of human bondage.

§ 34. In conclusion a restatement of the leading thoughts may not be inappropriate:

1. When the colonists laid the foundations of their respective governments they asserted those doctrines of political and personal freedom which constituted, finally, the legal and moral basis of the Revolution; and although in their weakness they submitted to acts which in their view were oppressive they never recognized the authority of the British Parliament, but upon their records and during a period of nearly a century and a half they asserted and as far as practicable they maintained their independence as political organizations.

2. The laws which they annulled or evaded were enacted

by an assembly whose authority they never acknowledged, and in which they were not represented.

3. Our fathers were careful to maintain their loyalty to the king as the sovereign of the British Empire and to perform all their duties as members of that Empire that the injustice of others might not have root in their own errors and wrongs.

4. The American Union did not originate in the present Constitution, nor even in the Articles of Confederation; but it is elementary in the history of the country, and, as far as we can judge, it is essential to our form of liberty.

From 1643, when the Union was formed between Massachusetts, New Plymouth, Connecticut and New Haven for "their own mutual safety and welfare," with the name, *The United Colonies of New England*, there seems never to have been a moment when the idea of Union did not exist in the public mind. Union was the necessity of their weakness as it now is the emblem of our origin and the source of our strength.

## CHAPTER II.

### THE CONFEDERATION.

§ 35. The scheme or plan of Confederation of the American Colonies, under the title of "The United States of America," was first announced in a resolution of the Continental Congress which was adopted the eleventh day of June, 1776. As early as the 21st of July, 1775, Dr. Franklin presented a plan to Congress for a "perpetual union of the Colonies." The paper contained a provision, however, for the return of the Colonies to their allegiance to Great Britain. (Madison Papers, p. 688.) Mr. Josiah Bartlett, of New Hampshire, was placed at the head of the committee appointed to prepare the Articles of Confederation, and it may be assumed fairly, in the absence of any authentic statement, that he proposed the resolution and that he originated the name by which the nation has been known since the Declaration of Independence. Its earliest recognition by a foreign nation was made by France in the treaty of alliance of 1778.

§ 36. It was not until the 15th of November, 1777, that the report of the committee was adopted by the Congress, and its full and final ratification was delayed until the thirtieth day of January, 1781, when the plan was accepted by Maryland, the last of the Colonies to enter into the Confederation of States.

The first Congress under the Articles of Confederation met at Philadelphia the second day of March, 1781.

The historical value of the Articles of Confederation is to be seen in the light which they shed upon the Constitution and the evidence which they furnish of the great and salutary changes in representative and popular opinion between the year 1777 and the year 1787.



§ 37. The style or name of the Confederacy, "The United States of America," was declared in the first article, but all inferences in favor of a consolidated government were precluded by the second article, which guaranteed to each State "its sovereignty, freedom and independence, and every power, jurisdiction and right" not "expressly delegated to the United States in Congress assembled."

This limitation of authority in Congress was strengthened by the use of the word "league" as expressing the nature of the bond by which the members of the Confederacy were bound to each other.

Whenever the word "Union" is used it is so connected with the phrase "Articles of Confederation" as to make it the equivalent of the word "league."

§ 38. The States were placed upon an equality, and each State was to be represented by not less than two nor by more than seven members who were empowered to give one vote. As a guard against the concentration and perpetuity of power it was declared that no person should act as "a delegate for more than three years in any term of six years; that no delegate should act as president for more than one year in three years;" and it was further provided that the delegates were incapable "of holding any office under the United States." Thus careful were the founders of the system to affirm the sovereignty of the several States, to guard against the concentration of power in individual delegates, and to avoid personal or State supremacy in the deliberations of the Congress.

Each State was to maintain its own delegates, and Congress was not clothed with power to pass upon the rights of claimants in case of conflict; and conflicts would have arisen probably had the Confederacy existed for a generation. To each State was reserved the power to recall its delegates at will and to send others in their stead.

§ 39. There were, however, some limitations upon the States which foreshadow the limitations imposed in the Con-

stitution. The States could not enter into treaties with each other nor with foreign nations ; they could not levy imports or duties which would interfere with treaty stipulations existing between the United States and any other government ; they could not keep vessels of war in time of peace ; they could not declare war although they might act upon their own motion for defensive purposes ; they could not maintain a standing army except upon the judgment of Congress as to its force, and then only for the garrison of forts ; and, finally, they could not grant commissions to ships of war nor issue letters of marque or reprisal.

§ 40. There were also grants of power to Congress which worked a limitation upon the sovereignty of the States. Congress was clothed with power to create a tribunal for the trial of controversies between the States ; to decide upon peace or war ; to create courts for the trial of piracies and felonies and for the disposition of captures on sea ; to enter into treaties which might restrain States in their capacity to collect duties and imposts ; to fix the standard of weights and measures ; to fix the value of coins that might be issued by Congress or by the States ; to establish a post-office system ; to borrow money and emit bills on the credit of the United States ; to build a navy ; to limit the land forces and apportion them among the several States ; to commission all officers in the land and naval service ; and, finally, to appoint the officers in the naval service and the officers in the land service above the grade of regimental officers.

§ 41. The votes of nine States were required for the exercise of the more important of these powers, such as a declaration of war, the granting of letters of marque and reprisal in time of peace, the coining of money and regulating the value thereof, the creation of a public debt, the building of a navy, the organization of an army, or the appointment of a commander-in-chief.

§ 42. Authority was conferred upon Congress by the vote of nine States to appoint committees to sit during a recess ;

but the powers of such committees were limited to those acts which did not in the Congress require the votes of nine States. In all essential particulars the Congress could act only by a two-thirds majority. Provision was made for the rendition of fugitives from justice, but no guarantees were given for the rendition of fugitives from slavery.

Freedom of speech in debate was secured, and the exemption of members from arrest was guaranteed in the terms which were afterwards incorporated in the Constitution.

§ 43. There was to be a common treasury that was to be supplied by requisitions upon the several States apportioned according to the value of the land with the value of the buildings and improvements added thereto. These values were to be ascertained by such mode as Congress might provide. Of necessity the States were charged with the assessment and collection of the taxes, and the performance of these duties was left to their capacity and good faith.

§ 44. The impotency of the Confederacy is apparent in the facts that it could not levy and collect a tax of a dollar, it could not command the services of a single man, nor had it control over an acre of ground, until certain of the States in 1780 and subsequently ceded to the Confederacy their undefined rights or claims to the territory west of State lines.

The Declaration of Independence, the exigency which was created by that act, and the common peril in which the Colonies were involved, saved the Confederacy from immediate dissolution.

Yet even during the war, and while the pressure was heaviest, the States often consulted their own convenience, or yielded to their apparent necessities and neglected the demands of Congress for men and money, or postponed their consideration from month to month. In some cases the appeals and demands were wholly neglected.

§ 45. When the war ended the weakness of the Confederacy became more and more apparent. It had not one

attribute of sovereignty which could be exercised in its fullness. It had power to borrow money, but it had no means of payment at its command either present or prospective. It could make treaties, but it had no capacity to perform the obligations so assumed. In fine by the year 1787, the work of disintegration had gone so far as to render the continuance of the system for another decade a most improbable event.

§ 46. From that experience of ten years two lessons were deduced. (1.) With all its imperfections the Confederacy had demonstrated the importance, the necessity, indeed, of a union of the States in one government.

(2.) That in that government there must be one central head with capacity for all the exigencies of national life.

§ 47. If it be assumed that the Articles of Confederation were the measure of the opinion of the country in 1777 upon the doctrine of State rights, it will be seen from an examination of the Constitution that signal advances were made in the succeeding ten years. The Confederacy had no continuing capacity for self-existence. It had no authority in action. The Confederacy did not create a nation, but it demonstrated the importance and the possibility of such a creation. The experience of the country under the Articles of Confederation made the Constitution possible.

§ 48. The opinion of the Supreme Court in the case of *Dred Scott v. Sandford* (19th How. p. 418) explains the meaning of the phrase "free inhabitant" as used in the Articles of Confederation; but since the adoption of the fourteenth and fifteenth amendments to the Constitution the interpretation is without practical value.

§ 49. A portion of the opinion in the case of *Texas v. White* (7th Wall. p. 725) is devoted to an examination of the nature of the Union formed by the Articles of Confederation. From that opinion and from the opinion in the case of *Lane County v. Oregon* (7th Wall. p. 76) this conclusion may be deduced, namely: That the Continental Congress could act

only upon and through the authorities of the several States, and even as to them the Congress was without capacity for coërcion ; while as to the citizens and inhabitants of the respective States the Congress had no power to control them in any particular whatever. These conclusions are the only reasonable conclusions which can be drawn from the Articles of Confederation.

### CHAPTER III.

#### THE ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO.

§ 50. When the Confederation of 1777 was formed several of the States claimed jurisdiction over and property in the territory west of the State lines. By deeds of cession those rights or claims were transferred to the United States, and on the 13th day of July, 1787, Congress adopted the ordinance for the government of so much of the territory as was situated northwest of the river Ohio.

§ 51. Although the title to the territory was derived in part from slave States, and conspicuously from the States of Maryland and Virginia, there was general and harmonious concurrence in the important provision of the ordinance which declared that there should be "neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted." (Art. VI.)

§ 52. By repeated decisions the Supreme Court has held that the stipulations and terms of the ordinance remained in force after the adoption of the Constitution, unless a conflict should appear, and in such a case the ordinance would yield to the Constitution. As the article in regard to slavery was not controlled by the Constitution, the exclusion of slavery became the supreme and continuing law of the territories and States that were organized in the vast region covered by the ordinance of 1787, and it may be assumed, fairly, that the character and power of those States made possible the extermination of the institution of slavery in all parts of the country. The parties to the ordinance of 1787 may have

builded better than they knew, but their work is one of the four great acts or events in the history of the Republic;—The Declaration of Independence, the Ordinance of 1787, the Constitution and the Amendment abolishing the institution of slavery.

§ 53. By the 14th section of the ordinance it was provided that the six articles, of which that relating to slavery was the most important, should “be considered as articles of compact between the original States and the people and States in the said territory” and to “remain unalterable, unless by common consent.”

§ 54. The Supreme Court has held, and without controversy, that the organization of States within the territory, and their admission into the Union, were acts of the parties to the original contract by which the Constitution of the United States and the constitutions of the respective States were substituted in law and in fact for the stipulations contained in the ordinance. A full statement of the reasons on which the decision of the court was made to rest may be read in the opinion of Chief Justice Taney in the case of *Strader v. Graham* (10 How. 82).

§ 55. By the terms of the ordinance the inhabitants of the territory were secured in their religious opinions and modes of worship, trial by jury, the privilege of the writ of *habeas corpus*, and due process of law in all civil and criminal cases were guaranteed.

§ 56. The inhabitants were enjoined to maintain public schools as promotive of religion and morality, and as essential to good government. They were required “to preserve the utmost good faith towards the Indians” and the explicit declaration was made that “their land and property should never be taken from them without their consent,” that there should be no invasion of their rights, property or liberties, and, finally, that no war should be made upon them without the authority of Congress.

Rules were given for the descent of the property of

intestates and the transmission of estates by will was authorized.

§ 57. The important offices in the territory were limited to freeholders, the leading features of a territorial government were specified and provision was made for the creation of three States. The ordinance, as a whole, was a scheme and a most liberal scheme of free government. The importance of the controversy over slavery, and the consequent importance of the inhibition contained in the ordinance of 1787, have tended to the neglect of the otherwise just and humane features of a system which then occupied and which now occupies historically a position midway between the Confederacy of 1777 and the Constitution of 1789.



## CHAPTER IV.

### THE PREAMBLE TO THE CONSTITUTION.

§ 58. When the Convention of 1787 assembled there was a general agreement in the opinion that the Confederacy of 1777 had failed as a frame of government, and that the absence of power to act by and through its own appointed and responsible agencies was the apparent defect of the system. The Confederacy was a league between the States; but the leading members of the Convention did not realize at the outset that that feature of the Confederation was the cause of its failure.

§ 59. Mr. Randolph proposed to enlarge and correct the Articles of Confederation so that the objects contemplated might be accomplished.<sup>1</sup> Again he proposed to so extend the powers of the Congress as that a negligent or recusant State might be compelled to perform its obligations.<sup>2</sup> These propositions contemplated the continuance of the league with increased powers in the hands of the general government.

§ 60. A national judiciary was a feature of Mr. Randolph's plan and in connection with the Executive it was to be clothed with power to revise the acts of the Legislative Department.

§ 61. The plan submitted by Mr. Charles Pinckney was more elaborate and more minute in its details, but it recognized the States in their sovereignty as States, as the basis of the National Government.

The Preamble opens thus: "We the people of the States of New Hampshire, Massachusetts," etc., etc., "do ordain, declare, and establish the following constitution for the government of ourselves and posterity."<sup>3</sup>

<sup>1</sup> Madison Papers, p. 731.

<sup>2</sup> Same, p. 732.

<sup>3</sup> Same, p. 735.

§ 62. The doctrine of State rights was further recognized in the provision that the members of Congress should be paid by the respective States.<sup>1</sup>

The same form of Preamble was reported by Mr. Rutledge, from the Committee of detail, as late as August 6, 1787.<sup>2</sup>

§ 63. On the 12th of September Dr. Johnson from the Committee on Style reported a draft of the Constitution in which the Preamble appears in the form which was adopted finally by the Convention.<sup>3</sup>

Between the 6th of August and the 12th of September the enumerated States disappeared and "the people of the United States" were introduced as the basis of the new government.

§ 64. The Confederacy derived its authority from the States and it could act only through the States, and only as the expressed wishes of the Congress should be accepted and enforced by the respective States. The Constitution was declared to be the work of "the people of the United States," and by them the new government was clothed with power to act directly upon the people and that without regard to State lines and without regard to the will of the inhabitants of particular States.

§ 65. The change of opinion in the Convention appears to have been a growth, due, probably, to the difficulty of creating a government with adequate powers and at the same time retaining in the States as States, a constitutional right to sit in judgment upon the acts of the national government. These theories of public policy in government were inconsistent, utterly; and for the moment and with the framers of the Constitution the doctrine of State Rights was subordinated to the circumstances which required a government capable of self-action in all the exigencies of national life.

§ 66. The nature and scope of the changes effected by the Constitution are set forth in the opinion given by Chief Justice Marshall in the case of *Gibbons v. Ogden* (9 Whea. 1).

<sup>1</sup> Madison Papers, p. 739.

<sup>2</sup> Same, p. 1226.

<sup>3</sup> Same, p. 1543.

Speaking of the arguments at the bar as to the interpretation of the Constitution he said, "reference has been made to the political situation of these States, exterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their Congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change." (p. 187.)

§ 67. The first announcement of the theory of government which is embodied in our Constitution appears to have been made by Dr. Noah Webster in a pamphlet published in the winter of 1784-5, entitled "Sketches of American Policy." He proposed "a new system of government which should act, not on the States, but directly on individuals, and vest in Congress full power to carry its laws into effect."<sup>1</sup>

This sentence indicates distinctly the defect in the Articles of Confederation, and it sets forth the theory on which the Constitution of 1787 was framed.

§ 68. In the case of *Chisholm* against the State of Georgia (2 Dall. 419), the Supreme Court held that under the original Constitution a State was subject to the jurisdiction of the United States in the matter of a claim by a citizen of another State. Although by the eleventh article of the amendments to the Constitution it is declared that the "judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State," yet the reasoning of the opinion in *Chisholm* against Georgia that the sovereignty of the United States is not derived from the States nor in any manner connected with

<sup>1</sup> Madison Papers, p. 708.

the sovereignty which the individual State may exercise, remains undisturbed.

§ 69. That doctrine was recognized and enforced by Chief Justice Marshall in the case of *McCulloch v. Maryland* (4th Wh. 316). "At the end it is to be said that there is a sovereignty of the States created by the people of the several States, and a sovereignty of the United States derived from the people of the United States and to be exercised and enjoyed freely, within the limits prescribed by the Constitution."

§ 70. The theory of government embodied in the Preamble to the Constitution was far in advance of the public opinion at the time, and the extent of the surrender of the doctrine of State Rights may not have been comprehended fully by the members of the Convention. The doctrine of State Rights, as that doctrine was expressed in the Articles of Confederation, had many and earnest supporters in the country. Indeed, it was visible in most of the objections that were made to the new Constitution. It caused a division in the cabinet of General Washington, it led to the organization of political parties, and although the destruction of the institution of slavery has extinguished the chief pretext for the support of the doctrine, it still has influence with those who contend for what is called "a strict construction of the Constitution."

§ 71. In the light of the two cases cited and in obedience to the teachings of the decisions of the Supreme Court it is to be said that the United States, as a government, does not derive its existence from the States in their political corporate capacity, but from the whole people, and independent of the fact that for certain purposes, not inconsistent with the purposes for which the national government was created, the same people owe allegiance to the several States; that the nation might exist even if the States, as political organizations, should disappear; and, finally, that the States as political organizations have no constitutional power to interfere with the action of the general government.

## CHAPTER V.

### THE CONSTITUTION.

#### ARTICLE 1. DISTRIBUTION OF POWERS.

§ 72. By section one of the first article of the Constitution, all legislative powers were vested in Congress ; by section one of article two the executive power was vested in the President ; and by section one of article three the judicial power was vested in one Supreme Court and in such inferior courts as Congress, from time to time, might ordain and establish.

§ 73. In 1793 Congress passed a law requiring the several Circuit Courts to examine wounded and disabled soldiers and seamen and report to the Secretary of War the nature and extent of disability in each case, together with an opinion as to the proportion of monthly pension that should be allowed to each. In certain cases a power of revision was reserved to the Secretary of War. (Stat. at Large, v. 1, p. 243.)

The Circuit Courts of Pennsylvania and North Carolina declined to comply with the statute and upon the ground that the duty was not judicial (Hayburn's Case, 2 Dall. 409, notes), and that the act was a violation of the several provisions of the Constitution in regard to the distribution of powers.

Attorney-General Randolph applied to the Supreme Court for mandamus to the Circuit Court of Pennsylvania to compel that Court to proceed under the statute, but the statute was repealed before final action was had.

The view entertained by the Circuit Courts of Pennsylvania and North Carolina was affirmed by the Supreme

Court in the case of the United States *v.* Ferreira (13 How. 40, and note). It is now beyond question that Congress cannot impose upon the courts the performance of any duties not strictly judicial.

## CHAPTER VI.

### RIGHTS AND PRIVILEGES OF MEMBERS.

§ 74. The several paragraphs of the second, third, fourth, fifth and sixth sections of the first article of the Constitution relate to the election, rights, privileges, powers and duties of members of the Senate and the House of Representatives, and only in a few instances have the questions arising thereon been brought within the jurisdiction of the Supreme Court.

§ 75. By section two, article one, all those persons who have the qualifications requisite for electors of the most numerous branch of the State legislature are entitled to vote for members of the House of Representatives; but by virtue of section four of the same article and by virtue of the fifteenth amendment, Congress can secure all such persons in the enjoyment of their rights as electors of members of the House. (*Ex parte Yarborough*, 110 U. S., 651.) In 1842 (5 Stat. 491) Congress established the single-district system, and by the act of February 2, 1872 (17 Stat. 28), it was provided that all elections for members of the House of Representatives should be held on the Tuesday next after the first Monday in November in the year 1876, and on the same day of every second year thereafter.

§ 76. Upon the authority of the Supreme Court in the case of *Yarborough*, it is to be said that Congress can secure to every citizen who is entitled to vote for a member of the lower branch of the Legislature in the State where he may reside the full and free enjoyment of the right to vote for a member of the national House of Representatives; and, further, it is to be inferred from the opinion in that case and from the statutes of 1842 and 1872, which have been observed in all parts of the country without controversy and without debate,

that every step in the proceedings by which members of the House of Representatives are elected, excepting only the qualifications of voters, is within the jurisdiction of the national government.

§ 77. The gravest exercise of power over State authorities is to be found in the statute of 1866 (Stat. 14, 243), which reappears in the Revised Statutes, sects. 14-17, inclusive. By that statute the Legislatures of the respective States are required on the second Tuesday after meeting and organization to proceed to the election of a Senator whenever a vacancy exists or whenever a vacancy will occur previous to the next meeting of the Legislature.

Each House is required openly and by a *viva voce* vote of each member present to name one person for Senator in Congress. On the next day the Houses are required to meet in Convention—the respective journals are to be read and if each House has given a majority of votes for the same person his election is to be declared; but if no such majority appears, then the two Houses are required to take at least one vote, and in case of a failure to elect, the Houses are required to meet each succeeding day at twelve o'clock, meridian, and take at least one vote until an election shall have been made, or the session shall have come to an end.

In this statute is the assertion on the part of the nation of every power in regard to the election of Senators, excepting only the places at which the elections are to be held.

§ 78. The Court has held that Congress has power under the Constitution to exercise supervisory control over elections for representatives to Congress, may impose new duties on officers of elections and provide against frauds. (*Ex parte Siebold*, 100 U. S. 371.)

§ 79. In two cases the Supreme Court has considered the power of the House of Representatives to punish persons not members for contempt of its orders.

In the fifteenth Congress John Anderson was arrested by the order of the House upon the charge that he had been guilty



of a breach of the privileges of the said House and of a high contempt of its dignity and authority. His offence was an attempt to bribe the Chairman of the Committee on Claims. He was imprisoned or held in custody by Thomas Dunn, the Sergeant-at-arms, for the term of nine days, when, upon his confession of guilt and a reprimand by Mr. Clay, the Speaker, he was discharged from custody. For this detention and imprisonment Anderson brought a suit against Dunn.

Upon the issue raised by demurrer the Court held that the House of Representatives had jurisdiction to punish for contempt in certain cases, and that the case of Anderson, upon the facts disclosed in the pleadings, was within that jurisdiction.

The opinion given by Mr. Justice Johnson seems to proceed upon the idea that the House was the proper and final judge of the extent of its jurisdiction. (*Anderson v. Dunn*, 6 Whea. 204.)

§ 80. The decision in this case was modified materially, and in some particulars it was overruled by the opinion of the Court in the case of *Kilbourn v. Thompson* (103 U. S. 168). Kilbourn refused to respond to a *subpoena duces tecum* issued by the order of the House, and thereupon he was arrested and confined in jail for the term of about forty-five days, when he was placed in the hands of the marshal of the District of Columbia in response to a writ of *habeas corpus* issued by the order of the Chief Justice of the Supreme Court of the District. For this arrest and imprisonment Kilbourn instituted a suit against Thompson, the Sergeant-at-arms, and the Clerk and Speaker of the House, and the members of the Committee that instituted the proceedings. As to the Speaker and the members of the Committee, the Court held that they were protected by the first paragraph of section six of the first article of the Constitution.

The Committee before which Kilbourn was summoned was engaged in the investigation of real estate transactions

in the District of Columbia in which, as was alleged, a debtor of the United States was concerned.

The Court held that the power of the House to punish for contempt was limited to proceedings that were judicial in character, as an election case or the impeachment of a public officer, and consequently that the order for the arrest of Kilbourn and his arrest and imprisonment were illegal acts, for which the defendants other than members of the House must answer.

The reasons for the conclusions reached by the Court are set forth in an elaborate opinion by Mr. Justice Miller.

§ 81. All the members of the House of Representatives who are present may be counted by the speaker for the purpose of ascertaining whether a quorum is present. (United States *v.* Ballin, 144 U. S. 1.)

By the second clause of section five, of article one, "each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds expel a member."

In one aspect of the meaning of this clause it is broad enough in its terms to warrant the expulsion of a member without reference to the time when the cause arose.

It should be observed, however, that the clause contains a provision for the punishment of a member for disorderly behavior, and from the connection it may with reason be maintained that expulsion is a punishment which may be resorted to for disorderly behavior in extreme cases, and then only by the concurrence of two thirds of the members.

If the object of the grant of power was to enable the Houses to maintain order, this limited construction is adequate to secure the object in view. Treating the provision as of a penal character its terms are not to be extended beyond the limits necessary to the accomplishment of the end sought.

## CHAPTER VII.

### POWER TO LEVY AND COLLECT TAXES.

#### ART. 1, SEC. 8, PAR. 1.

“The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.”

§ 82. As early as June 5, 1794 (1 Stat. 373) an act was passed imposing a tax upon all carriages kept for use, for the conveyance of passengers, or to be let for hire. The payment of the tax was resisted upon the ground that it was a “direct tax,” according to the meaning of the terms used in the Constitution, and therefore could only be laid by an apportionment among the States in the manner prescribed in section two of the first article. The Court held that the tax was not a direct tax and that the authority was derived from the paragraph now under consideration. (*Hylton v. The United States*, 3 Dall. 171.) That decision has not been disturbed, and it remains as the basis of the authority for the various excise laws by which enormous revenues have been gathered into the treasury of the United States.

§ 83. The commissioners of Erie County, Pennsylvania, having levied a tax upon the salary of one Dobbins, an officer of a United States revenue cutter, the Court held that a State could not tax an officer of the United States for his office or its emoluments. (*Dobbins v. The Commissioners of Erie County*, 16 Pet. 435.)

§ 84. It was held in the case of the Collector *v.* Day that Congress had not authority, under the Constitution, to impose a tax upon the salary of a State officer. (*The Collector v. Day*, 11 Wall. 113.) The reasoning of the opinion justi-

fies the conclusion that it is not competent for the general government to impose a tax upon any of the instrumentalities by which a State maintains its organization and performs its proper and necessary functions. In this respect the State governments and the national government are upon an equality.

§ 85. In accordance with this view the Court held in the case of the *United States v. Railroad Co.* (17 Wall. 322) that the general government could not levy a tax upon the revenues of a State municipal corporation.

This decision follows the doctrine announced in the case of *National Bank v. Commonwealth* (9 Wall. 353). It is there said that State legislation which does not impair the usefulness of the instrumentalities of the national government is not within the rule of prohibition.

§ 86. In the case of *Scholey v. Rew* (23 Wall. 331) it was held that the provisions of the international revenue laws which imposed a tax on every "devolution of title to real estate" was not a "direct tax," but an excise tax authorized by the provision of the Constitution now under consideration.

§ 87. In further construction of this clause the Court held in the case of *Cook v. Pennsylvania* (97 U. S., 566) that a State tax upon a sale of foreign goods while in the original packages, and while the property of the importer, was an unconstitutional tax, being so by virtue of the first paragraph of section eight and paragraph two of section ten of the first article.

## CHAPTER VIII.

### POWER TO BORROW MONEY ON THE CREDIT OF THE UNITED STATES.

#### ART. 1, SEC. 8, PAR. 2.

§ 88. By the second paragraph of section eight, article one, Congress is authorized "to borrow money on the credit of the United States." The practical interpretation of this power has given rise to differences of opinion in the Court and to controversies among the people.

§ 89. The exercise of this power, as the power has been construed by the Court, works a limitation of the authority of the States to raise a revenue by taxation of the property of the citizens, when that property is in the form of bonds, notes or other securities of the United States.

§ 90. It was held in the case of *McCulloch v. State of Maryland* (4 Whea. 316) that it was competent for the United States to create a corporate bank with branches to be located in the several States at the pleasure of the parent bank, and that the bank and its branches were exempt from taxation by the States. The bank was considered an instrumentality through whose aid and agency the government might borrow money. Chief Justice Marshall, speaking for the Court and without dissent on the part of any member, said, "The States have no power by taxation or otherwise to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is," he added, "the unavoidable consequence of that supremacy which the Constitution has declared. . . . This is a tax on the operations of the bank, and is, con-

sequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

More than a half-century ago the bank ceased to exist, but the interpretations of the Constitution to which its existence gave rise have not been disturbed by the subsequent decisions of the court.

§ 91. The power of a municipal corporation to tax "the stock of the United States" was raised in the case of *Weston v. The City Council of Charleston* (2 Pet. 449). The so-called "stock" appears to have been bonds issued by the government as evidence of indebtedness arising from a loan of money to the United States. On the authority of the case of *McCulloch v. State of Maryland*, and in conformity to the reasoning of the opinion in that case, the Chief Justice said, "The tax on government stock is thought by this Court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."

Two of the justices dissented from the conclusion reached by the majority, but the conclusion itself has been affirmed from time to time and it is now the accepted law of the country.

§ 92. Following the line of decisions already cited the Court has held that obligations of the United States known as "certificates of indebtedness," issued to public creditors were exempt from taxation by States and municipalities. (*The Banks v. The Mayor*, 7 Wall. 16.)

§ 93. For the same reason and upon the same line of public policy, United States notes issued under the Loan and Currency acts of 1862 and 1863 and known as "greenbacks," are exempt from taxation by virtue of State authority. (*Bank v. Supervisors*, 7 Wall. 26.)

§ 94. Early in the period of the civil war the courts adopted or recognized certain nice distinctions in the claims of States to levy taxes upon the capital of banks and upon shares of stockholders in banks.

§ 95. A statute of the State of New York authorized the levy of a tax upon the property of State banks upon its appraised value, and that without regard to the fact that some or all of its capital might be invested in securities or obligations issued by the United States. Under this statute the city of New York levied a tax upon the appraised value of the capital of the Bank of Commerce, although a portion of that capital was invested in bonds issued by the authority of Congress. The validity of the statute was sustained by the Court of Appeals of the State of New York, but the decision was reversed by the Supreme Court and the statute was declared unconstitutional and void. (*Bank of Commerce v. New York City*, 2 Black. 620.)

It was intimated in the opinion that a tax upon the nominal capital of the bank, without regard to the property or value of the property held by the bank, would be sustained as a valid tax.

§ 96. Subsequently the State of New York enacted a law by which authority was given to the municipalities to levy a tax upon banks, and upon the basis of the capital stock paid in or secured to be paid in, and, again, without any inquiry as to the character of the investments. In the case known as the "Bank Tax Case" (2 Wall. 200), which came to the Supreme Court upon a writ of error in which a large number of banks were plaintiffs, the Court held that the cases then at bar could not be distinguished from the case of the Bank of Commerce.

Speaking for the Court, Mr. Justice Nelson said, "Having come to the conclusion that the tax on the capital of the Bank of the Commonwealth is a tax on the property of the Institution, and which consists of the stocks of the United States, we do not perceive how the case can be distinguished from that of the Bank of Commerce."

§ 97. By the act establishing and regulating national banks (Rev. Stat. § 5219), the States were authorized to assess the shares in banks subject to two limitations. (1) That the

tax should "not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," and (2) that the shares owned by non-residents of the State should be assessed in the towns where the banks might be located.

The validity of this statute both as to the authority conferred upon the States and as to the limitations imposed was recognized in the case of *Van Allen v. Assessors* (3 Wall. 573) and the case of "*National Bank v. Commonwealth*" (9 Wall. 353). In the former case the tax was declared to be illegal, for the reason that a like tax was not authorized and imposed upon the shares of State banks.

Thus did the Court recognize the validity of the limitations imposed by the statute of the United States; and thus have Congress and the Court recognized the National Banks as instrumentalities capable of aiding the government in the exercise of its power "to borrow money."

§ 98. In the presence of these authorities and having in mind the scope given to Congress in the matter of discretion in the case of *McCulloch v. The State of Maryland*, it seems safe to assume that the field for the exercise of that discretion in the selection of instrumentalities for the purpose of exercising the power conferred by this paragraph of the Constitution is limited only by other plain provisions of that instrument, or by the powers reserved to the States; and that the instrumentalities so selected may each and all be exempted from taxation by municipalities and State governments.

§ 99. On the 25th of February, 1862, Congress passed an act which authorized an issue of the notes of the United States to the amount of one hundred and fifty million dollars and made them "receivable in payment of all taxes, internal duties, excises, debts and demands of every kind due to the United States, except duties on imports"; and it provided also that said notes should "be lawful money and a legal tender in payment of all debts public and private within the United



States, except duties on imports and interest" upon bonds and notes of the United States. (12 Stat. 345.)

§ 100. By an early decision (*Lane County v. Oregon*, 7 Wall. 71), it was held that the taxes mentioned in the statute of 1862 were taxes levied by the authority of the United States, and that taxes levied by the States were subject to State laws and might, if required, be levied and collected in gold coin.

This decision seems to recognize a necessary principle of government, viz.: that each State has power to raise its revenues in the form most compatible with the comfort, convenience and welfare of the community within its limits.

§ 101. In the statute of the State of Oregon, which was the subject of contention, it was declared that the sheriff should "pay over to the county treasurer the full amount of the State and school taxes in gold and silver coin." From this injunction the Court deduced the legal conclusion that the taxes were to be paid in gold and silver coin.

In the absence of any statute provision as to the kind of money in which payment must be made, it may be assumed that taxes levied by State authority could be paid in United States notes.

§ 102. The statute of February 25, 1862, and subsequent statutes, which authorized the issue by the Secretary of the Treasury of notes of the United States and made them a legal tender for the payment of debts theretofore contracted, gave rise to a question which disturbed the harmony of the Court and led finally to the announcement of an opinion at the December term of 1869 (*Hepburn v. Griswold*, 8 Wall. 603) which was reversed and overruled in the one essential particular at the December term of 1870. (*Legal Tender Cases*, 12 Wall. 457.)

§ 103. When the first decision was rendered, five of the eight judges who constituted the Court were of opinion that so much of the act as authorized the liquidation of then

existing contracts by payment in United States notes was unconstitutional.

§ 104. Mr. Justice Grier was of the opinion that the act had no application to debts contracted prior to its enactment; but upon the construction given to it by the other judges he concurred in the opinion that the clause, so far as it made United States notes a legal tender for such debts, was not warranted by the Constitution. Justices Miller, Davis and Swayne dissented.

§ 105. By the act of April 10, 1869 (16 Stat. 44), the Supreme Court was thereafter to consist of a Chief Justice and eight associate justices. At that time the Court consisted of the Chief Justice and seven associate justices. By the act of July 23, 1866 (14 Stat. 209), the number of associate justices was limited to six, the reduction to take place upon the death or resignation of a member. Mr. Justice Grier resigned February 1, 1870, and the two vacancies were filled by the appointment of Justices Strong and Bradley. At the hearing of the "Legal Tender Cases" the newly appointed justices accepted the views of the dissenting justices in the case of *Hepburn v. Griswold*, and the conclusion reached in that case was overruled.

§ 106. In the case of *Juilliard v. Greenman* (110 U. S., 421) the Court, by Mr. Justice Gray, held that the power of Congress to authorize the issue of legal tender notes was not a war power, but that it was within the discretion of Congress to exercise the power in peace as well as in time of war. The members of the Court were unanimous in the opinion that the power to give to United States notes the legal tender quality did not depend upon a condition of war.

§ 107. In the case of *Hepburn and Griswold* (8 Wall. 603), the argument in support of the statute was made to rest chiefly upon the power of Congress to declare war. It was contended that the legal tender quality of United States notes gave them value as means for the prosecution

of a war when the main power of declaring war had been exercised. This argument was answered by Chief Justice Chase in the opinion rendered, by a recurrence to the fact that during the war of the rebellion the government had issued notes that were not legal tender notes and which had been received and used in the business of the country without any discrimination or discount. It was claimed in the opinion that the payment of a preëxisting debt in legal tender notes impaired the "obligation of the contract"; and that it was the intention of the framers of the Constitution that the obligation of contracts should not be impaired although no such inhibition was imposed upon the government of the United States.

§ 108. On the other hand, it was contended by the minority of the Court that the denial to the States of the power to make any thing but gold and silver coin a legal tender, and the absence of any like denial to the national government, justified the inference that the power to pass the act of February 25, 1862, was lodged in Congress.

§ 109. Having thus maintained the existence of the power, the minority proceeded to inquire whether the exercise of the power at the time and under the circumstances then existing was "necessary and proper." To the words "necessary and proper," as used in the Constitution, a liberal construction was given. Borrowing the words of Chief Justice Marshall in the case of the United States *v.* Fisher (2 Cranch, 358), they said "where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary, because the end might be attained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of the power granted by the Constitution."

§ 110. They cited the case of the United States and Fisher, in which the Court held that for the purpose of

enabling the government to pay its debts a preference could be given to the United States over other creditors of an insolvent debtor, and they ask, "How can we say that the legal tender clause was not necessary and proper to enable the government to borrow money to carry on the war?"

§ 111. The minority did not admit that the obligation of a preëxisting contract was impaired when payment was made in legal tender notes, but they claimed that the value of the obligation was impaired only remotely. They claimed, however, that full power resided in Congress, of which an example is found in the authority to pass a bankrupt law, by which the obligation of contracts is impaired absolutely. Finally, they cited the action of the two Houses of Congress, the sanction of President Lincoln who approved the bill, the decisions of the courts of fifteen States that had recognized the validity of the legal tender acts, and all in support of their constitutionality.

§ 112. The reasons for and against the existence of the power were fully presented and exhaustively argued in the Legal Tender Cases and in the case of *Juilliard v. Greenman*, much more so indeed than in the case of *Hepburn and Griswold*.

In the Legal Tender Cases the court submitted two questions for argument by counsel:

(1.) Is the act of Congress known as the legal tender act constitutional as to contracts made before its passage?

(2.) Is it valid as applicable to transactions since its passage?

§ 113. In the opinion given in the case of *Hepburn and Griswold* the Court held that the statute was unconstitutional so far as it attempted to make the notes a legal tender in liquidation of existing contracts; but the tenor of the reasoning warrants the conclusion that the majority of the Court were of opinion that the act was constitutional when applied to subsequent engagements.

§ 114. On the contrary, in the Legal Tender Cases the Court refused to recognize a distinction on that ground, and held that the only question was this: Has Congress power to make anything but gold and silver coin a legal tender? Upon reaching the conclusion that Congress had that power, the Court held that the effects or consequences of its exercise could not be controlled by the fact that a contract antedated the statute.

§ 115. In the Juilliard case the Court say: "It appears to us to follow, as a logical and necessary consequence, that Congress has power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency, for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States." (Legal Tender Cases, 110 U. S., 447.)

§ 116. In the same case (page 450) the Court say: "We are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress. . . . Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by

Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts."

§ 117. The most exhaustive opinion is that from the pen of Mr. Justice Strong in the Legal Tender Cases (12 Wall. 457).

From that opinion these propositions are deduced, viz.:

That the distinction between expressed and implied powers under the Constitution is one of phrases and not a distinction in fact:—

That in the concluding clause of the eighth section of the first article there is a grant of powers, not enumerated, which in their nature and scope correspond to the powers which are granted to Congress, and enumerated, in the preceding clauses of the same article:—

That while Congress has power under the Constitution to impair the obligation of contracts the Legal Tender Act only affected the value of the obligation, and that remotely. As a precedent, the Court referred to the act of June 28, 1834 (4 Stat. 699), by which a reduction was made of about six per cent in the intrinsic value of gold coins—thus affecting the intrinsic value of contracts for gold coin but without impairing the obligation:—

That the limitation upon the power of the States to make anything but "gold and silver coin a tender in payment of debts," did not warrant the inference that the powers of Congress were therefore so limited; but on the contrary, that the limitation on the powers of the States and the absence of any limitation on the powers of Congress justified and required the conclusion that Congress had power to provide and prescribe other legal tender currency than gold and silver coin:—

That "the obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made":—

That the means by which war is to be carried on, by which money is to be borrowed, by which the value of money is to

be regulated, by which armies are to be raised and supported, by which navies are to be maintained, by which the various powers vested in the general government are to be executed, are within the discretion of Congress, if not contrary to some provision of the Constitution or to some recognized principle of government.

## CHAPTER IX.

### THE REGULATION OF COMMERCE.

#### ART. 1, SEC. 8, PAR. 3.

“The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”

§ 118. The third paragraph of the eighth section of the first article of the Constitution which grants to Congress power “to regulate commerce with foreign nations, and among the several States, and with the Indian tribes,” has given rise to questions of signal importance by whose adjudication the rights of States have been defined and the limits of national authority have been ascertained and established.

§ 119. As new industries have been created and as existing industries have been multiplied and extended, conflicts have arisen between the jurisdiction of States and the jurisdiction of the general government.

Of these conflicts the earliest and most important of all was the conflict between the laws of the State of New York and the laws of the United States which resulted in the historical case of *Gibbons and Ogden* (9 *Whea.* 1).

§ 120. By the laws of the State of New York a grant for a term of years was made to Robert Fulton and an associate of the “exclusive navigation of all the waters within the jurisdiction” of the State of New York “with boats moved by fire or steam.” By assignment the right to navigate the waters between the city of New York and Elizabethtown and other places in New Jersey was transferred to one Ogden, the complainant in the case. The defendant, *Gibbons*, was charged with running two steamboats between



the city of New York and Elizabethtown in violation of the exclusive privileges so granted to Ogden. By a proceeding in equity Gibbons was enjoined, the injunction was made perpetual by Chancellor Kent and affirmed by the highest Court of law and equity in the State. The case was brought to the Supreme Court by writ of error. Mr. Wirt, then Attorney General, appeared for the government, Mr. Webster appeared for Gibbons and Messrs. Oakley and Emmett were retained by Ogden. The opinion of the Court was given by Chief Justice Marshall. Greater names than these have not been associated with any case in our history.

§ 121. One aspect of the theory of State Rights was discussed at the bar, and the application of that theory to our system of government was dealt with philosophically and in the light of history by the Chief Justice in the lucid and comprehensive opinion which he rendered on that occasion.

That the scope of the opinion may be comprehended and the line between State and national jurisdiction may be seen, it is necessary to direct attention to the argument and grounds of argument on which the claim of Ogden was made to rest.

§ 122. It was claimed that the grant of power to Congress to regulate commerce did not operate to deprive the States of that power which they possessed, severally, before the Constitution was formed, and that in case of a conflict the opposing powers were equal.

This fallacy was disposed of by the declaration by the Court that by the second paragraph of article six, the Constitution and laws of the United States, made in pursuance thereof, were the supreme law of the land, binding each State, anything in its Constitution or laws to the contrary notwithstanding.

§ 123. Again it was contended that the power to regulate commerce among the States was limited to the control of the merchandise transported, and that jurisdiction was not given

to Congress over navigable waters within State limits, nor to passengers passing from one State to another.

To the first of these claims the Court said the word "commerce," as used in the Constitution, comprehends and has been always understood to comprehend navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce." Commerce is traffic, said the Court; but it is something more — it is intercourse.

Nor could the Court find any ground for a distinction between passengers and goods as subjects or objects of commerce among the States. In fine, it was declared that vessels employed in the transportation of passengers were under the control of Congress equally with vessels employed in the transportation of merchandise.

§ 124. The Court held that all vessels enrolled agreeably to the laws of the United States were subject to the laws of Congress; that the vessels in question, even if employed exclusively in carrying passengers, would constitute a part of the "coasting trade," and that the occupation of the vessels could not be drawn in question before the Court.

§ 125. A similar view was taken of the suggestion that the powers of Congress were limited to sailing vessels. Indeed, the writ of injunction and decree restrained the vessels, not for carrying passengers, but for the reason that they were propelled by steam. The Court said the laws of Congress for the regulation of commerce do not look to the power nor to the principle of propulsion. The choice of power is left to individual discretion.

§ 126. Finally the Court said, "The power of Congress comprehends navigation within the limits of every State in the Union, so far as that navigation may be in any manner connected with commerce with foreign nations, or among the several States, or with the Indian tribes." "The completely internal commerce of a State may be considered as reserved for the State itself."

§ 127. The value of this opinion is not to be measured and limited by its controlling influence upon the subsequent decisions of the Court upon questions arising under the clause relating to commerce, but rather to the assertion of principles and the announcement of rules of interpretation by which the Constitution, as a body of fundamental law, was saved from the peril of a construction so limited as that the national government would have been subordinated to the States. That was the evil of the Confederation: it was the peril to which the Constitution was exposed.

§ 128. Some of the important propositions embodied in that opinion may be thus stated, viz.:

That when a power is granted to Congress full means for the exercise of that power are granted also;—

That the laws of the United States, made in pursuance of the Constitution, are the supreme law of the land, and that in all cases of concurrent jurisdiction, as well as in cases of conflict upon a claim of State supremacy, the laws of a State must yield to the laws of the United States;—

That the powers expressly granted to the government of the Union are not to be contracted by construction into the narrowest possible compass; but are to be so construed as that for the purposes of government and within the limits prescribed by the Constitution, the sovereignty of the nation is as complete as it would be if the States did not exist;—

That the action of the general government is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the national government.

§ 129. The right of a State to tax a foreign corporation engaged in interstate commerce was very fully discussed by Mr. Justice Field in an opinion of the Supreme Court in the case of the Gloucester Ferry Co. v. The State of Pennsyl-

vania (114 U. S. 196). The company was incorporated under the laws of New Jersey and was engaged in transporting passengers by ferry boats across the Delaware River, from Gloucester, New Jersey, to Philadelphia. Under a statute of the State of Pennsylvania the city of Philadelphia assessed a tax upon the property. An attempt was made in the argument to lead the Court to hold that the business of transporting passengers was not included under the power to regulate commerce. The Court held, as was held in the case of *Gibbons and Ogden*, that no distinction could be made between the business of transporting merchandise and the business of transporting passengers.

§ 130. Following the rules and principles laid down in the opinion in the case of *Gibbons and Ogden*, the Court has held that all navigable waters within the limits of a State which are accessible by navigable waters to the inhabitants of any other State are subject to the control of Congress.<sup>1</sup>

§ 131. Until Congress legislates, the States have full power over the navigable waters within their respective States and may authorize the erection of dams and bridges and the removal of obstructions to navigation; but the law is otherwise when Congress has acted.<sup>2</sup>

The control of a State is absolute over so much of its territory as is between high and low water marks.<sup>3</sup>

States may improve the navigable waters within their limits and charge tolls for the use of such improvements.<sup>4</sup>

<sup>1</sup> *Veazie v. Moor*, 14 How. 568. *Gilman v. Philadelphia*, 3 Wall. 713. *The Daniel Ball*, 10 Wall. 557.

<sup>2</sup> *State of Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518. *State of Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 18 How. 421. *Pound v. Turk*, 95 U. S. 459; *Miller v. Mayor of New York*, 109 U. S. 385. *Cardwell v. American Bridge Co.*, 113 U. S. 205. *Willamette Iron Bridge Co.*, 125 U. S. 1.

<sup>3</sup> *Smith v. State of Maryland*, 18 How. 71.

<sup>4</sup> *Packet Co. v. Keokuk*, 95 U. S. 80. *Packet Co. v. St. Louis*, 100 U. S. 423. *Vicksburg v. Tobin*, 100 U. S. 430. *Packet Co. v. Catlettsburg*, 105 U. S. 559. *Huse v. Glover*, 119 U. S. 543.

§ 132. In the opinion given in the case of *Moran* against the city of New Orleans the extreme limit of the exercise of national authority was asserted apparently. (112 U. S. 69.)

The city of New Orleans imposed a license tax upon all professions and callings, including persons engaged in owning and running towboats to and from the Gulf of Mexico. The tax upon these classes was held to be unconstitutional as imposing a restraint upon commerce among the States.

§ 133. From many decisions the legal conclusion may be drawn that it is not competent for a State to so discriminate in its legislation as to give an advantage to its own citizens over citizens of other States, whether such legislation relates to persons engaged in commerce among the States, or to the means employed in the conduct of such commerce, or to the articles of commerce passing from one State to another.

§ 134. In the case of *Guy* against the city of Baltimore (100 U. S. 434) the character of previous decisions was considered by the Court, and the comprehensive conclusion was announced that "it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or in the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory."

Of the many cases that might be cited the following are among the most instructive, viz.: *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Machine Co. v. Gage*, 100 U. S. 676; *Tiernan v. Rinker*, 102 U. S. 123; *Cooper Manufacturing Co. v. Ferguson and Another*, 113 U. S. 727; *Wabash, St. Louis and Pacific Railway Company v. Illinois*, 118 U. S. 557; *Fargo v. Michigan*, 121 U. S. 230; *Smith v. Alabama*, 124 U. S. 465.

§ 135. The doctrine of national supremacy has been so applied as to restrain States that have imposed discriminating

taxes upon the means and agencies employed in commerce among the States. The State of Tennessee having imposed a "privilege tax" of fifty dollars per annum upon every sleeping-car used or run over a railroad in the State and not owned by the railroad using the car, the Court held that the act was unconstitutional as far as it applied to cars used in the transportation of passengers into, out of or across that State. (*Pickard, Comptroller, v. Pullman Southern Car Co.*, 117 U. S. 34.)

The elaborate opinion in this case cites, explains and affirms the leading decisions of the Court that had been rendered previously. This doctrine has been extended to elevators used for the storage of grain designed for interstate commerce. *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. Stoesser*, 153 U. S. 391.

§ 136. By a series of decisions the Court has asserted the most ample and exclusive jurisdiction over telegraph companies as far as such companies may be engaged in the transmission of messages over State lines.

The various decisions cited under this text justify certain conclusions, viz. :

That telegraph companies engaged in foreign or interstate business are instruments of commerce and subject to the control of Congress as to interstate and foreign business ; —

That such companies are subject to the control of the respective States as to those transactions that are within State limits exclusively ; —

That a telegraph company organized under the laws of a particular State is not subject to the jurisdiction of that State as to its doings and methods of business in other States ; —

That the authority which a State may exercise within its jurisdiction as to wires, poles and buildings, as to lines traversing other States, is subject to the free exercise of power by Congress over the same subject matters ; —

That a State tax upon receipts derived from interstate or foreign business is invalid ; —

That a license tax for the privilege of doing business among the States or with foreign countries is invalid.

Telegraph Co. *v.* Texas, 105 U. S. 460; Western Union Telegraph Co. *v.* Pendleton, 122 U. S. 347; Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411; Leloup *v.* Port of Mobile, 127 U. S. 640; Postal Telegraph Co. *v.* Charleston, 153 U. S. 692.

§ 137. In the case of the State of California against the Pacific Railroad Company (127 U. S. 1), the Court say, "The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce." In the case of Covington & Cincinnati Bridge Company *v.* Kentucky (154 U. S. 204), the Court held that a bridge across the Ohio River from Kentucky to Ohio was an instrument of commerce, that the traffic over the bridge was interstate commerce, and that the imposition of tolls by State authority was an attempt to regulate commerce and unconstitutional and void.

§ 138. When goods, the product of a State, have been placed in the custody of a carrier for the purpose of being transported to another State they have become the subjects of interstate commerce and are not taxable in the State of their origin nor in any State through which they may pass. (Coe *v.* Errol, 116 U. S. 517.)

§ 139. The decisions in regard to foreign commerce have asserted with unvarying uniformity the supremacy of the general government and to the exclusion of all authority on the part of States.

The statute of the State of Texas which authorized a tonnage tax upon vessels arriving at quarantine in that State, and for the purpose of defraying the expense of maintaining the quarantine station, was held to be a violation of the Con-

stitution as a "duty on tonnage" and as an infringement upon the exclusive power of Congress "to regulate commerce among the several States." (*Peete v. Morgan*, 19 Wall. 581.)

§ 140. A statute of the State of Louisiana which authorized a survey of the hatches of sea-going vessels and of damaged goods arriving by sea at the ports of the State, was declared to be void, as an attempt to regulate the foreign and interstate commerce of the country. (*Foster v. Masten*, etc., of New Orleans, 94 U. S. 246.)

§ 141. With like stringency the Court has asserted and maintained the exclusive jurisdiction of Congress over the transportation of passengers upon navigable waters to and from foreign countries and between the States of the Union.

The character and extent of that jurisdiction are set forth at length in the opinions given by the several justices of the majority of the Court in the cases cited as "Passenger Cases." (7 How. 283.)

Two cases were argued together and decided upon the same grounds, substantially.

One case was brought to the Supreme Court by a writ of error to the Court of Errors of the State of New York, and the other by a writ of error to the Supreme Court of Massachusetts.

The statute of New York required every master of a vessel arriving from a foreign or domestic port to pay a head tax upon every passenger.

The statute of Massachusetts imposed a tax upon aliens only, but it corresponded with the New York statute in every other important particular. The constitutionality of these statutes was the question at issue.

By the opinion of five of the nine justices the statutes were declared void and inoperative, except as to that portion of the statute of Massachusetts which required a bond of one thousand dollars before any person, who, upon examination, should be adjudged a lunatic or an idiot, or for other



specified reasons should be found incapable of providing for himself, should be permitted to land. The majority of the Court — Justices McLean, Wayne, Catron, M'Kinley and Grier — followed the opinion rendered by Chief Justice Marshall in the case of *Gibbons and Ogden*.

The dissenting justices were Chief Justice Taney, and Justices Daniel, Nelson and Woodbury.

§ 142. The doctrine of State Rights and the apprehension that the sovereignty of the States was to be lost in the supremacy of the national government are apparent in the opinions of the dissenting justices. On the other hand, it is evident that the majority regarded the result reached as a triumph of the principles for which the Union was established, and by which the national government is distinguished from a compact or league which characterized the Confederacy.

In concluding his opinion, Mr. Justice Wayne said, "The case of *Gibbons and Ogden*, in the extent and variety of learning, and in the acuteness of distinction with which it was argued by counsel, is not surpassed by any other case in the reports of Courts. In the consideration given to it by the Court, there are proofs of judicial ability, and of close and precise discrimination of most difficult points, equal to any other judgment on record. To my mind every proposition in it has a definite and unmistakable meaning. Commentaries cannot cover them up or make them doubtful.

"The case will always be a high and honorable proof of the eminence of the American bar of that day, and of the talents and distinguished ability of the judges who were then in the places which we now occupy.

"There were giants in those days, and I hope I may be allowed to say, without more than judicial impressiveness of manner or of words, that I rejoice that the structure raised by them for the defence of the Constitution has not this day been weakened by their successors."

§ 143. Never in the trial of any cause has the bar of America been more ably represented. The array included Mr. Webster, John Davis, David B. Ogden, Rufus Choate, John Van Buren, Willis Hall, J. Prescott Hall and George Ashmun.

§ 144. The statutory questions at issue were comparatively unimportant. The real question—a question of the gravest importance was this: Shall the rules of construction embodied in the opinion of Chief Justice Marshall, in the case of Gibbons and Ogden, be changed, and the Constitution of the United States subordinated to the power of the States?

This was the crucial moment in our constitutional history. The decision in the “Passenger Cases” ended the controversy in the Courts over the rules for the interpretation of the Constitution. By that decision the line between national sovereignty and State sovereignty was marked permanently, and in conformity to the doctrine held and announced by Chief Justice Marshall.

§ 145. Under that decision the action of the general government has been applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; while to the States is reserved the control of those matters which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government.

§ 146. Of the nine judges that constituted the Court five were from the South, where the doctrine of State Rights was accepted more generally than in other sections. Of the majority, three, Wayne, Catron and McKimley, were from that section, while of the minority, Nelson and Woodbury were from the North. It is only just to say that the country is indebted to the South, to the old slave States, for that interpretation of the Constitution which guarantees unity, sovereignty and power to the nation, and leaves to the

States the control of those matters which appertain to their own fortunes, respectively, and which do not interfere with the general government nor disturb the relations of States to each other. (See also *Henderson v. Mayor of New York*, 92 U. S. 259; *People v. Compagnie Générale Transatlantique*, 107 U. S. 59; *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326.)

§ 147. By the several decisions cited below the Court has held that State laws imposing special taxes upon carriers of passengers or freight from one State to another by the ordinary modes of travel are in effect attempts to regulate commerce among the States, and consequently are unconstitutional and void.

*Crandall v. State of Nevada*, 6 Wall. 35; *Case of the State Freight Tax*, 15 Wall. 232; *Hall v. De Cair*, 95 U. S. 485.

§ 148. In the cases quoted as Head Money Cases (112 U. S. 580), the Court held that a statute of the United States (22 Stat. 214) which imposes upon the owners of steam or sailing vessels a duty of fifty cents for each passenger, not a citizen of the United States, brought in such vessels from any foreign country, was a lawful exercise of the power to regulate commerce with foreign nations.

The levy was not treated as a tax for revenue to be applied to ordinary purposes, but as a contribution designed to mitigate the evils of immigration.

§ 149. A State tax upon "drummers," that is, upon persons soliciting orders for goods, is unconstitutional as to "drummers" who represent merchants or manufacturers who are inhabitants of other States than that in which the tax is levied. *Robbins v. Shelby Taxing District*, 120 U. S. 489; *Corson v. Maryland*, 120 U. S. 502; *Asher v. Texas*, 128 U. S. 129; *Brennan v. Titusville*, 153 U. S. 289.

§ 150. For corresponding reasons a tax upon the sales of imported goods in the original packages, when sold by an importer or by an auctioneer, or the imposition of a license fee upon an importer, is an unconstitutional exaction and

therefore void. *Brown v. State of Maryland*, 12 Whea. 419; *Cook v. State of Pennsylvania*, 97 U. S. 566.

§ 151. The meaning of the words "imports" and "exports" is limited to merchandise brought from, or destined to, foreign ports, and the words have no relation to the products of the United States and used or destined to be used in the domestic trade of the country. *Woodruff v. Parham*, 8 Wall. 123; *Brown v. Houston*, 114 U. S. 622.

§ 152. The power of Congress over commerce, both interstate and foreign, is absolute and exclusive as against State legislation, and therefore State statutes affecting such commerce are unconstitutional, and equally so whether Congress has or has not legislated upon the particular matters to which the State laws may relate. *Brown v. Houston*, 114 U. S. 622.

§ 153. This rule is not so extended, however, as to prevent the erection of dams, bridges and other structures across or over navigable waters when such structures are designed to promote public interests, and the power of Congress has not been exercised over the same subject. *Wilson v. The Blackbird Creek Marsh Co.*, 2 Pet. 245.

§ 154. Nor does the rule deprive States of the power to regulate matters that are necessary for local purposes and which affect foreign and interstate commerce only incidentally, such, for example, as pilots, wharves, harbors, roads, bridges, tolls, police, quarantine, etc. *Coolay v. Wardens of Philadelphia*, 12 How. 299; *Sherlock v. Alling*, 93 U. S. 99; *Brown v. Houston*, 114 U. S. 622; *Morgan v. Louisiana*, 118 U. S. 455.

§ 155. For the scope of State authority over the subjects enumerated, and the limitations of its exercise, the following named cases may be consulted: *City of New York v. Miln*, 11 Pet. 102; *Wilson v. McNamee*, 102 U. S. 572; *Sprague v. Thompson*, 118 U. S. 90; *Brass v. Stoeser*, 153 U. S. 391.

The rule of general application to be deduced from these

decisions is that all laws which appear to be reasonable in their relation to the subject matter will be sustained unless controlled by the legislation of Congress.

§ 156. Especially is this doctrine true as to legislation for the punishment of maritime torts upon waters within the territorial jurisdiction of the State enacting the laws. *Sherlock v. Alling*, 93 U. S. 99.

§ 157. In the "License Cases," reported in Howard's Reports, volume 5, page 504, it was held that the laws of States regulating the sale at retail of imported liquors were not repugnant to the Constitution of the United States.

§ 158. State laws which prohibit the manufacture of spirituous or malt liquors within its jurisdiction do not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States, or by the amendments. *Mugler v. Kansas*, 123 U. S. 623.

By the legislation of the State of Kansas which gave rise to the foregoing suit, it was made a misdemeanor for any person to sell spirituous, vinous or fermented liquors without a license, and by a subsequent change in the Constitution the manufacture and sale of intoxicating liquors, except for certain specified purposes, was prohibited.

The Court held that these inhibitions and regulations were not in conflict with the power of Congress to regulate commerce; that their enforcement was not an impairment of the rights and immunities of citizens, and not in conflict with the fourteenth amendment to the Constitution.

§ 159. In the case of *Mugler v. Kansas*, Mr. Justice Field, in a dissenting opinion, expressed a doubt whether a State could prohibit the manufacture of intoxicating liquors within its limits if the liquors were for exportation or for transportation to other States, but in the case of *Kidd v. Pearson* (128 U. S. 1) the Court was called to meet the question. The opinion of the Court appears to warrant the following conclusions, viz.:

That it is the province of a State to decide whether a particular business may or may not be carried on within its limits: —

That the State of Kansas having prohibited the manufacture of spirituous liquors, and the manufacture being thus unlawful, the liquors so unlawfully manufactured could not be introduced into the commerce of the country through the agency of the national government: —

That the right of a State to enact a statute prohibiting the manufacture of intoxicating liquors within its limits is not affected by the fact that the manufacturer of such spirits intends to export them when manufactured.

§ 160. By a statute of the State of Michigan a tax was imposed upon persons, who, not having their principal place of business in the State, should engage in soliciting or taking orders for spirituous liquors to be brought into the State.

The Court held that the statute was an infringement of the power of Congress to regulate commerce among the States. (*Walling v. Michigan*, 116 U. S. 446.)

§ 161. Again the Court held that a statute of the State of Iowa was unconstitutional which forbade common carriers to bring intoxicating liquors into the State unless they first procured a certain kind of certificate from the auditor of the County into which the liquors were to be brought. (*Bowman v. Chicago and North Western Railway Co.*, 125 U. S. 465.)

§ 162. A State may not prohibit the sale of liquors imported, when on sale by the importer and in the original packages. (*Leisy v. Harden*, 135 U. S. 100.) Under the force of remedial legislation this decision was reversed in case of *In re Rahrer*, 140 U. S. 545.

## CHAPTER X.

### NATURALIZATION.

#### ART. 1, SEC. 8, PAR. 4.

“The Congress shall have power to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.”

§ 163. So much of the fourth paragraph of section eight of article one, as authorizes Congress to establish a “uniform rule of naturalization” has not been brought in question, directly, before the Supreme Court.

§ 164. In the *Dred Scott* case (*Dred Scott v. Sandford*, 19 How. 393), the Court decided in effect, although not in form of statement, that Congress had not power to provide by law for the naturalization of free negroes whose ancestors were imported into the country and held as slaves. *Dred Scott*, the plaintiff, was born in slavery in the State of Missouri; but at a time previous to the commencement of the suit he was carried by his master to Illinois, where slavery was prohibited. After his return to Missouri with his owner the claim was made that he had become a freeman by his residence in Illinois.

The validity of this claim was the question at issue in the Circuit Court for the District of Missouri.

§ 165. The question was raised upon a plea in abatement by the defendant and upon the ground “that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves.”

To this plea a demurrer was filed by the plaintiff, and upon

issue joined the plea was overruled and the defendant was ordered to answer over.

At the trial the verdict and judgment were in favor of the defendant. By a writ of error the case was brought by the plaintiff to the Supreme Court.

§ 166. The judgment of the Circuit Court was reversed upon the ground that Dred Scott, for the reasons stated, was not a citizen of Missouri, and, consequently, that the Circuit Court had no jurisdiction of the case.

Therefore by the decision of the Supreme Court, as well as by the verdict and judgment of the Circuit Court, Dred Scott was left in slavery.

§ 167. The main feature, if not the only feature of the decision which related to the power of Congress to pass a "uniform rule of naturalization" was the declaration that a free negro, even though born of parents who were free, if descended from ancestors who were imported from Africa and who were held as slaves, could not be made a citizen under any naturalization law which Congress was capable of passing, nor could he by State laws be so endowed with the rights of citizenship as to enable him to maintain a suit against a party residing in another State.

As will be seen hereafter, this doctrine of the Supreme Court was annulled by the Fourteenth Amendment to the Constitution.



## CHAPTER XI.

### BANKRUPTCY.

§ 168. Of the cases that have arisen touching the powers of Congress and the powers of the States under the provision of the Constitution relating to bankruptcies, two only need to be considered, viz.: *Sturges v. Crowninshield*, 4 Wh. 122; *Ogden v. Saunders*, 12 Wh. 213.

In the other reported cases no new doctrines are announced, and the decisions rest upon principles set forth in the opinions rendered in the two cases named.

§ 169. An insolvent law or bankrupt act was passed by the State of New York in the year 1811. By its terms an insolvent person, upon the surrender of his property and by compliance in other respects with the requirements of the statutes, was discharged from all his debts and liabilities contracted previous to his discharge.

§ 170. The Court held that the statute of a State might discharge the person of a debtor, but that the attempt in the law of New York to release him from liability was unconstitutional and void, as impairing the obligation of contracts. The statute of New York was passed April 3, 1811. The notes of the defendant, on which the suit was founded, were dated March 22, 1811. Consequently, the power of a State to pass an insolvent law, applicable only to contracts thereafter made, was not considered by the Court.

§ 171. This question was raised, however, in the case of *Ogden and Saunders*, and disposed of by a divided Court.

A bankrupt or insolvent law of the State of New York, dated April 3, 1801, provided for the discharge of insolvent debtors, upon certain specified terms and conditions, from

further liability as to debts contracted subsequent to the passage of the law.

The suit was founded on bills of acceptance made by Ogden when a citizen of New York, in favor of one Saunders of Kentucky. . The bills were protested for non-payment. Ogden was adjudged a bankrupt in New York, and obtained his discharge under the statute. He afterwards became a citizen of Louisiana. Saunders, a citizen of Kentucky, brought the suit in the District Court of the United States for the District of Louisiana. The plaintiff obtained judgment, and by writ of error the case was brought to the Supreme Court.

It was twice argued by Wirt, Attorney General, Webster, Clay, Wheaton, David B. Ogden, Edward Livingston and others.

§ 172. It was contended by the counsel for Ogden that a contract made after the date of the statute was subject to the condition that the debtor party might avail of the statute, and, therefore, that there could be no impairment of the obligation of the contract by a discharge in bankruptcy upon due compliance with the terms of the statute.

§ 173. The counsel for Saunders relied upon the opinion of the Court in the case of *Sturges and Crowninshield*, and maintained that the nature of the contract was not affected by the statute, and that the State had no more power to change the obligations of contracts to be made than it had to change the obligations of contracts already existing.

§ 174. The verdict and judgment of the District Court were reversed by a majority of the Supreme Court, consisting of Justices Washington, Johnson, Thompson, and Trimble. The dissenting Justices were Chief Justice Marshall and Justices Story and Duvall. At the end, however, and upon a secondary if not subordinate question, the judgment of the Court below was affirmed.

§ 175. The leading opinion of the majority was given by Justice Washington, and in the main it was in harmony

with the argument of the counsel for Ogden. He claimed that there were classes of municipal laws, such as "laws of evidence, or which concern remedies, laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation," etc., "which may affect the validity, construction, or duration or discharge of contracts."

And again he says: "It is then the municipal law of the State, whether that be written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout, wherever its performance is sought to be enforced."

§ 176. Towards the conclusion of his opinion he says: "I have, throughout the preceding part of this opinion, considered the municipal law of the country where the contract is made as incorporated with the contract, whether it affects its validity, construction or discharge.

"But I think it quite immaterial to stickle for this position, if it be conceded to me, what can scarcely be denied, that this municipal law constitutes the law of the contract so formed, and must govern it throughout."

§ 177. Chief Justice Marshall, speaking for the minority of the Court, said, "the single question for consideration is, whether the act of the State of New York is consistent with or repugnant to the Constitution of the United States."

He proceeded to make distinctions between laws relating to remedies, such as laws of limitation and laws affecting the obligation of contracts.

Laws against usury and statutes of frauds which were cited by Justice Washington as analogous to the New York statute, he characterized as preëxisting regulations by which limits were set to the legal capacity of parties to make contracts, and therefore they could not be construed as impairing the obligation of contracts.

Finally he asserted that the words of the Constitution, that no State shall pass "any law impairing the obligation of contracts, taken in their natural and obvious sense,

admit of a prospective as well as of a retrospective operation:—

“That an act of the legislature does not enter into the contract and become one of the conditions stipulated by the parties, nor does it act externally on the agreement, unless it have the full force of law:—

“That contracts derive their obligation from the act of the parties, not from the grant of government; and that the right of the government to regulate the manner in which they shall be formed, or to prohibit such as may be against the policy of the State, is entirely consistent with their inviolability after they have been formed:—

“That the obligation of a contract is not identified with the means which government may furnish to enforce it; and that a prohibition to pass any law impairing it, does not imply a prohibition to vary the remedy, nor does a power to vary the remedy imply a power to impair the obligation derived from the act of the parties.”

§ 178. From the opinions of the Court in the two cases cited, these propositions are deduced, viz.:—

(1.) A State insolvent law cannot so operate as to relieve parties to contracts existing when the law is passed from the obligation to perform their contracts according to their tenor.

(2.) A State has power to enact a bankrupt or insolvent law which may operate upon all future contracts made within the jurisdiction of the State, and between parties and citizens of the State.

§ 179. As the bills which Ogden accepted were drawn by one Jordan, a citizen of Kentucky, in favor of Saunders, also a citizen of Kentucky, a secondary question arose and was considered by the Court, viz.:—

Did the discharge granted to Ogden under the laws of the State of New York affect the right of Saunders, the owner of the bills, he being at the time a citizen of Kentucky?

§ 180. Chief Justice Marshall and Justices Story and

Duvall were of opinion that the statute of the State of New York could not affect the rights of a non-resident creditor, and that a State law was not competent to discharge a debt due a citizen of another State. This view was concurred in by Justice Johnson against the dissent of Justices Washington, Thompson and Trimble.

§ 181. Thus it appears that the very important questions touching the powers of States and affecting the rights of parties to contracts were decided by a bare majority of the Court, and with much hesitation by one of the justices of the first majority.

Mr. Justice Washington, in the opening of his opinion, says: "I have examined both sides of this great question with the most sedulous care, and the most anxious desire to discover which of them, when adopted, would be most likely to fulfil the intentions of those who framed the Constitution of the United States. I am far from asserting that my labors have resulted in entire success.

"They have led me to the only conclusion by which I can stand with any degree of confidence; and yet, I should be disingenuous were I to declare from this place, that I embrace it without hesitation, and without a doubt of its correctness. The most that candor will permit me to say upon the subject is, that I see, or think I see, my way more clear on the side which my judgment leads me to adopt than on the other, and it must remain for others to decide whether the guide I have chosen has been a safe one or not."

§ 182. The three rulings or legal conclusions which were thus reached and announced by the Court have been observed without serious question to the present time, and yet only one of them can be treated as entirely free from ground for just criticism.

§ 183. After an experience of two-thirds of a century it is difficult to realize the fact that the Court divided upon the question whether the rights of a party to a contract should be subject to the operations of a bankrupt law enacted

by a State which had no jurisdiction over him, and to which he owed no allegiance.

§ 184. When the Constitution was formed, England had a bankruptcy system which took effect upon contracts regardless of their relations in the matter of dates, to the dates of the statutes concerning bankruptcy.

§ 185. The States had passed bankruptcy laws or stay laws, and their power to pass such laws was not questioned. Indeed, that right has been recognized in passing observations to be found in the opinions of the Supreme Court.

§ 186. The Constitution annulled many of the powers which the States were understood to possess, such as the power to coin money, the power to emit bills of credit, and the power to pass Bills of Attainder, *ex post facto* laws, and other similar powers which appertain to a sovereign State.

As the power to pass bankruptcy laws was a recognized power of the States, and as the Constitution is silent upon the subject, the necessary presumption arises that that power was to remain in the States as it had existed previous to the adoption of the Constitution.

§ 187. The power granted to Congress was the power to establish a uniform system of bankruptcy; that is, to do what it was impossible for the States to accomplish either before or after the adoption of the Constitution.

§ 188. Although there is not in the Constitution a denial to Congress of the power to pass laws impairing the obligation of contracts, it is yet true that Congress has never assumed to exercise such power, and the Courts have indicated that the power does not exist.

Therefore, when Congress was authorized to establish a uniform system of bankruptcy, it could not have been understood that Congress was thereby authorized to impair the obligation of contracts in the sense that is attached to the phrase as it is used in the Constitution.

§ 189. A system of bankruptcy is designed to apply only to parties who are incapable, in a pecuniary sense, of per-

forming the obligations of the contracts that they have made. In some cases the obligations have lost a part of the nominal values which they had when they were made; in other cases the obligations have become wholly valueless. The moral obligation to perform a contract cannot be destroyed nor impaired either by a party or by the government; but a moral obligation has no present value except so far as it is supported by the ability of the failing party to respond pecuniarily to the claims that may be made upon him.

§ 190. A bankrupt law does not impair the moral obligation of contracts. On the contrary, it takes possession of the property of an insolvent debtor, enforces the performance of the obligations of his contracts to the extent of his present ability, and thus far it acts in aid of the moral obligation.

The law does not undertake to perform impossible things, and it has no means of enabling a bankrupt to pay his debts in full. A bankrupt law does all that law can do; it takes possession of the bankrupt's property and divides it *pro rata* among his creditors.

§ 191. Thus far there can be no doubt as to the morality of the proceeding, but the question remains, on what ground can the bankrupt be discharged from further liability? The answer, whether sufficient or insufficient, is to be found in the statement that it is against public policy to keep citizens, guilty in law of no crime, in a condition of semi-servitude, from which a meagre minority only can ever escape.

§ 192. If the three national bankrupt laws that have been enacted cannot be assailed successfully upon the ground that those laws impaired the obligation of contracts, it remains to be said that a State bankrupt law which should operate upon preëxisting contracts could not be assailed successfully and for like reasons.

In this view of the subject, the holding in the case of *Sturges and Crowninshield* was an erroneous holding. This is but saying that a State might wisely and properly do for its own citizens and strictly within its own jurisdiction, what

Congress could wisely and properly do for the whole country.

§ 193. The opinion rendered in the case of *Sturges and Crowninshield* that a State law could not operate upon pre-existing contracts made inevitable the question raised in the case of *Ogden and Saunders*, viz.: Can a State law set aside the obligation of future contracts, or in less objectionable phraseology, can it relieve obligors from the performance of their contracts.

§ 194. The Court by a majority, and by a process of reasoning which Mr. Webster opposed at the bar, and which Chief Justice Marshall condemned from the bench, maintained the doctrine that an existing bankrupt law was in fact either incorporated into every subsequent contract, or so controlled the contracts that the law could operate upon and annul the contracts without any impairment of the obligations.

§ 195. Whatever may be thought of the logic and the law involved in the opinion of the majority in the case of *Ogden and Saunders*, the decision was a fortunate decision. As was said by Chief Justice Marshall, not much time could elapse before all contracts would be subject to the control of a statute which should operate *in futuro*. Such has been the experience of States that have maintained insolvent laws as a fixed public policy. If the opinion of the minority had prevailed, the States would have been powerless to maintain an insolvency system of any sort, and the commercial sections of the country would have been left to the vacillating policy which has marked the proceedings of Congress in regard to a uniform system of bankruptcy.



## CHAPTER XII.

### POWER TO COIN MONEY, ETC.

#### ART. 1, SEC. 8, PAR. 5.

“The Congress shall have power to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.”

§ 196. Under the clause of the Constitution which empowers Congress “to coin money, regulate the value thereof, and of foreign coin,” only two questions of importance have been considered by the Supreme Court.

In the consideration of these questions the Court was required to interpret the succeeding clause of the Constitution which gives to Congress power “to provide for the punishment of counterfeiting the securities and current coin of the United States.”

§ 197. The first question came, by writ of error, from the Supreme Court of the State of Ohio. (*Fox v. State of Ohio*, 5 How. 410.) The plaintiff was indicted, tried, and convicted under a law of the State, for passing a counterfeit coin, knowing the same to be counterfeit. For the defendant it was contended that under the two clauses of the Constitution the power to legislate upon the subject was in Congress exclusively. The Court held that if the authority of Congress was in any degree exclusive, its exclusive power was limited to laws for the punishment of persons found guilty of the crime of *counterfeiting* coin and securities as distinguished from the crime of passing such counterfeited coin or securities. But the Court went further and held that although Congress was invested with power to punish the crime of counterfeiting, it was competent for a State to provide for the punishment of the same offence, and the

suggestion was made that the offender might be subject to trial and penalty in each jurisdiction.

§ 198. Justice McLean dissented from the opinion of the Court, and he says in his dissenting opinion that Mr. Justice Story, at a conference held during the life of Justice Story, expressed his dissent from the view of the Court.

§ 199. In the case of the United States against Marigold (9 How. 560), the Court sustained the constitutionality of the twentieth section of the act of March 3, 1825. (4 Stat. 121.) By that section it was declared to be an indictable offence for any person to bring into the United States any counterfeit coin with intent to pass the same, or to utter, publish or sell any such coin knowing the same to be false, forged or counterfeit, and with intent to defraud.

§ 200. The suggestion is made in the opinion of the Court that the constitutionality of the act could be maintained under the power to regulate commerce with foreign nations; but this view is not enforced by argument. The opinion rests upon the claim that under the power to coin money and to regulate its value, it is the duty of Congress to create and to maintain "a uniform and pure metallic standard of value throughout the Union;" and, consequently, that by penal statutes it may prohibit the introduction of forged and counterfeit foreign coin, with intent to defraud any person or body corporate, and may also provide for the punishment of the offence of uttering and passing the same.

## CHAPTER XIII.

### POST OFFICES AND POST ROADS.

#### ART. 1, SEC. 8, PAR. 7.

“The Congress shall have power to establish post offices and post roads.”

§ 201. From the opinion of the Court in the case of the State of Pennsylvania *v.* The Wheeling and Belmont Bridge Company (18 How. 421), the inference is warranted that there are no restrictions upon the powers of Congress to establish “Post Roads.” As to “Post Offices,” no limits can be set to the power of Congress to authorize their establishment. Indeed, it is the existence of such unlimited power which gives value to the system, and a kindred reason exists in the matter of “Post Roads.”

§ 202. The State of Virginia having authorized the construction of a bridge across the Ohio River at a point where the river separates that State from Pennsylvania, the latter State filed a bill to restrain the parties engaged in the work from completing the structure.

A conditional injunction was granted. The defendant corporation was permitted to continue the work only upon the condition that certain specified alterations were made in the plan of the bridge. The Court found that the bridge, as authorized by the statute of Virginia, was an obstruction to navigation, and that the statute of Virginia was an infringement upon the power of Congress to regulate commerce among the States.

§ 203. As the agents of the corporation continued the work upon the bridge without conforming to the order of the Court, several motions were made to enforce the original decree by process of attachment for contempt, and for the

neglect of the officers of the corporation to obey an injunction granted by Mr. Justice Grier. (18 How. 421.)

§ 204. While these proceedings were pending, Congress passed an act by which the bridge, as it had been authorized by the State of Virginia, was made a legal structure, and established as a Post Road "for the passage of the mails of the United States."

§ 205. The Court, by a majority, were of opinion that the act of Congress afforded full authority to the defendants to reconstruct the bridge, and that the decree directing its alteration or abatement could not, therefore, be carried into execution after the enactment of the law. Consequently the motion for an attachment for disobedience of the former decree was denied.

Justices Wayne, Grier and Curtis were of opinion that the attachment for contempt should be issued.

§ 206. This opinion is of value in connection with the act of Congress making the Wheeling Bridge a United States Post Road, as warranting the conclusion that the power to establish Post Roads is limited only by the discretion of Congress.

## CHAPTER XIV.

### INVENTIONS AND DISCOVERIES.

#### ART. 1, SEC. 8, PAR. 8.

“The Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

§ 207. Although the legislation of Congress under the clause which confers power “to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,” has brought to the attention of the Court a great variety of questions, both practical and theoretical in their nature, it is yet true that the validity of that legislation under the Constitution has never been the subject of controversy.

The most that can be said is that authors and inventors have only those rights of property and protection in their respective writings and inventions, which are secured to them by the statutes of the country. No rights are derived directly from the Constitution. (*Grant v. Raymond*, 6 Pet. 218; *Wheaton and Donaldson v. Peters and Gregg*, 8 Pet. 591; *Banks v. Manchester*, 128 U. S., 244.)

In the trade-mark cases (100 U. S., 82) the Court refused to recognize a trade mark as within the scope of this clause of the Constitution, it being neither an invention, nor a writing, nor a discovery.

The suggestion is made that a trade mark could only be protected by legislation under the clause of the Constitution which gives to Congress power to regulate commerce.

## CHAPTER XV.

### PIRACIES AND FELONIES.

#### ART. 1, SEC. 8, PAR. 10.

“The Congress shall have power to define and punish piracies and felonies committed on the high seas, and offences against the Laws of Nations.”

§ 208. In the case of the United States against Palmer (3 Whea. 610) the Court was called, incidentally, to consider whether the clause of the Constitution, which gives to Congress power “to define and punish piracies,” should be so construed as to authorize Congress to declare that certain acts were piracies, which by the laws of nations were not so recognized when the Constitution was formed, or whether the power was so limited that Congress could only name and provide for the punishment of acts that were then so recognized as acts of piracy.

§ 209. By the eighth section of the act of April 30, 1790 (1 Stat. 131), it was provided “that if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State, murder or robbery, or any other offence, *which* if committed within the body of a county, would by the laws of the United States be punishable with death” . . . “every such offender shall be deemed a pirate and felon, and being convicted thereof, shall suffer death.”

§ 210. The Court was called to decide whether the word *which* related to the phrase, “murder or robbery, or any other offence,” or was limited to the phrase or “any other offence.” The latter interpretation was adopted by the Court, and thus a robbery, which if committed within the body of a county was not punishable by death under the laws of the United

States, was declared to be piracy. The opinion was given by Chief Justice Marshall, and it contained an able argument in support of the position taken by the Court.

§ 211. From that opinion Mr. Justice Johnson dissented — in language indicating deep feeling and strong convictions as to the wisdom and justice of the decision.

He says: "Singular as it may appear, it really is the fact in this case, that these men's lives may depend upon a comma more or less, or upon the question whether a relative, which may take in three antecedents just as well as one, shall be confined to one alone. Upon such a question I here solemnly declare, that I never will consent to take the life of any man in obedience to any Court; and if ever forced to choose between obeying this Court on such a point or resigning my commission, I would not hesitate adopting the latter alternative."

§ 212. As the interpretation then given to the statute has not been changed, and as the statute itself remains in force (Rev. Stat. 5372), it may be considered settled doctrine that those acts which by the laws of the United States are declared to be acts of piracy must be so recognized by the Courts of the country, and that without regard to the laws of nations.

§ 213. The constitutionality of the embargo act of 1794 (1 Stat. 372), and of the non-intercourse act of 1809 (2 Stat. 506-528), was never controverted, although several cases for the enforcement of these statutes were before the Supreme Court. (*Schooner Hoppet v. The United States*, 7 Cranch, 389, and others.)

## CHAPTER XVI.

### WAR POWERS.

#### ART. 1, SEC. 8, PAR. 11.

“The Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.”

§ 214. In the case of *Brown against the United States* (8 Cranch, 110), the question was considered whether in a state of war, property of a citizen or subject enemy found upon land, could be confiscated by an order of Court without a legislative act authorizing its confiscation.

On this point, Chief Justice Marshall said: “That war gives to the sovereign full right to take the persons and property of the enemy wherever found, is conceded. . . . When the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the Court.”

§ 215. The war powers of Congress were very fully considered and treated in the opinion of the Court in the case of *Miller and the United States* (11 Wall. 268). From the conclusions of that opinion, Justices Field and Clifford dissented.

At the hearing the constitutionality of two statutes, which provided for the confiscation of the property of persons engaged in the rebellion, was controverted. (12 Stat. 319, 589.)

The following propositions seem to be established by the opinion of the Court, viz.:—

(1.) That in civil war the government *de jure* has the rights of a sovereign and of a belligerent as well:—



(2.) That all persons within the control of the rebel authorities are public enemies, and may be treated as such:—

(3.) That as public enemies their property might be confiscated wherever found, and that, being amenable to the sovereignty of the government, they were liable by one process of law, to punishment for offences committed:—

(4.) That “the confiscation of property is not because of crime, but because of the relation of the property to the opposing belligerent, a relation into which it has been brought in consequence of its ownership.”

§ 216. Miller, the plaintiff in error, was a citizen of Virginia, who had held office under the government of the United States previous to the war.

During the war he was employed in various ways in the service of the Confederacy.

He was the owner of stock in two corporations in the State of Michigan.

By a proceeding under the statute of 1862, denominated a proceeding *in rem*, the stock was seized under an order of the Court, by notice to the officers of the corporations, and, by publication, constructive notice, or implied notice, was given to Miller.

These proceedings, one and all, were held to be valid.

§ 217. Justices Field and Clifford dissented.

In the main the grounds of their dissent were:—

(1.) That “the provisions of the act were not passed in the exercise of the war powers of the government, but in the exercise of the municipal power of the government to legislate for the punishment of offences against the United States.”

(2.) That the proceeding was a criminal proceeding, and in violation of the fifth and sixth articles of the amendments to the Constitution, which provide that no person can be punished for crime except by trial and conviction by a jury.

(3.) That by the laws of nations the war powers of a belligerent did not extend to the confiscation of property on land; and that the war powers of Congress under the Constitution were limited by the laws of nations as those laws were recognized by the nations of Europe at the time when the Constitution was formed.

(4.) That proceedings *in rem* for the confiscation of the property of parties charged to be guilty of certain overt acts of treason cannot be maintained without their previous conviction for the alleged offences.

These propositions were disregarded, in part, by the Court, and as to the remainder, they were overruled in the opinion that was rendered.

§ 218. The power "to declare war" and to make rules "concerning captures on land and water," would seem to vest in Congress the most ample authority over the whole subject. Rules arising from usage and treaty stipulations, called, in the aggregate, the law of nations, can be considered properly only by the law-making branch of the government. The so-called "law of nations" is not a code, and the rules which are classed under that phrase possess no binding force. When they are recognized by nations, they are recognized upon moral grounds or from considerations of State policy. There would seem to be no tenable basis for the doctrine that the war powers of Congress are limited or controlled in any degree by the "law of nations;" and with less reason can the position be maintained that the judicial department of the government is clothed with authority to declare a statute void as contrary to the "law of nations."

## CHAPTER XVII.

### “TO PROVIDE AND MAINTAIN A NAVY.”

#### ART. 1, SEC. 8, PAR. 13.

§ 219. There has been but one decision touching the extent of the powers of Congress “to provide and maintain a navy.” In the case of *Dynes* against *Hoover* (20 How. 65), it was held that the power of Congress to make rules for the government of the land and naval forces was not restrained nor limited by the Eighth Amendment to the Constitution in reference to jury trials and presentments by grand juries; and, consequently, that persons belonging to the land and naval forces are subject to trial and punishment under military law.

## CHAPTER XVIII.

### THE MILITIA.

#### ART. 1, SEC. 8, PAR. 15.

“The Congress shall have power to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions.”

§ 220. By the act of February 28, 1795 (1 Stat. 424), the President, among other powers conferred upon him, was authorized, in case of invasion, to issue orders to militia officers of the States, to call them into the service of the United States with their respective commands, and, in case of disobedience of orders, to subject them to trial and punishment by courts-martial.

§ 221. In the year 1814 the State of Pennsylvania enacted a statute by which it was provided that any officer or private of the militia of that State who should neglect or refuse to obey the orders of the President as aforesaid, should be liable to trial and punishment by a court-martial organized under the statute of Pennsylvania.

§ 222. The constitutionality of both these statutes was drawn in question in the case of *Houston v. Moore* (5 Whea. 1).

Houston, the plaintiff in error, was a private in the militia of the State and a member of an organization which was ordered by the Governor to rendezvous, in obedience to a requisition of the President. Houston, who disregarded the order, was subjected to trial by court-martial, convicted and fined. The fine was collected by a levy upon his property. He brought a suit against the officer for the recovery of the amount of the fine, and upon the ground that the statute of Pennsylvania, in the particulars applicable to the case at

bar, was contrary to the laws and Constitution of the United States.

§ 223. Thus the Court was led to consider the nature and extent of the powers granted to the general government by the Constitution of the United States over the militia of the States.

Either directly or indirectly, all the provisions of the statute of 1795 were affirmed.

That statute recognized the authority of the United States in these particulars, viz.:—

To call forth the militia of the States to suppress insurrection, or to repel invasion:—

To subject them to the command of the President while in service:—

To subject them to the rules and regulations prescribed for the government of the regular army:—

To be subject to trial by courts-martial:—

To prescribe the manner in which the militia is to be organized, armed, disciplined and governed:—

In fine, the decision recognizes the absolute authority of the national government over the militia of the States, in the exigencies specified, only reserving to the States, respectively, the appointment of the officers and the training of the militia according to the discipline prescribed by Congress.

§ 224. A nice distinction was recognized in an opinion by the majority of the Court, from which, however, Justices Johnson and Story dissented.

The statute of Pennsylvania prescribed a trial by court-martial, and punishment for a violation of the statute of the United States. The counsel for Houston contended that inasmuch as the offence, as alleged, was in violation of a law of the United States, he was triable only under the laws of the United States.

The Court held that Congress having neglected to assume exclusive jurisdiction over the offender and the offence at the time when the offence was committed, namely, when

Houston neglected to respond to the order to appear at a place specified in the order, it was competent for the State authorities to enforce the statute of the State.

§ 225. In the more recent case of *Martin against Mott*, (12 Whea., 19), the Court went so far as to decide that the judgment of the President was conclusive as to the existence of the exigency, and that it was not necessary to aver the fact of the existence of the constitutional reason for calling forth the militia; for, said Mr. Justice Story, "when the President exercises an authority confided to him by law, the presumption is that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty until the contrary is shown; and, *a fortiori*, this presumption ought to be favorably applied, to the chief magistrate of the Union."

§ 226. During the rebellion a more comprehensive statute was passed, entitled "an act for enrolling and calling out the national forces and for other purposes," dated March 3, 1863. (12 Stat. 731.)

By that statute all able-bodied male citizens of the United States, and all persons of foreign birth who had declared their intention to become citizens, between the ages of twenty and forty-five years, were enrolled, and declared to be the national forces, and made subject to the orders of the President as commander-in-chief.

The constitutionality of that statute was not controverted before the Supreme Court, but its validity was recognized in two important cases. (*United States v. Scott*, 3 Wall. 642, and *Coleman v. Tennessee*, 97 U. S. 509.)

## CHAPTER XIX.

### THE SEAT OF THE GOVERNMENT.

#### ART. 1, SEC. 8, PAR. 17.

“The Congress shall have power to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.”

§ 227. Under the seventeenth clause of the eighth section of the first article of the Constitution, which gives to Congress jurisdiction over the seat of government, and over forts, arsenals, and other needful public buildings, there have been many decisions by the Supreme Court, and the conclusions in the more important of them may be thus stated:—

§ 228. In the case of *Hepburn and Ellzey* (2 Cr. 445), it was decided that the District of Columbia was not a State, and consequently that a citizen of the District was incapable of maintaining a suit against a citizen of Virginia under the statute giving to Circuit Courts jurisdiction of cases between citizens of one State and citizens of another State.

§ 229. It was also held that the word “State,” as used in the Constitution, had not the meaning given to it by writers upon public law, but was limited to the organizations composing the Federal Union, each one of which is entitled to be represented by two senators in the Senate of the United States.

§ 230. In the case of *Loughborough v. Blake* (5 Whea. 317), the Court held that Congress had power to levy a

direct tax on the District of Columbia for the general purposes of the government as distinguished from a tax to meet local expenditures.

§ 231. The authority of the Supreme Court of the District of Columbia to issue the writ of *mandamus* to an executive officer of the government compelling him to do an act, merely ministerial, required by law, and concerning which he has no discretion, is fully recognized in the case of *Kendall v. The United States* (12 Pet. 524).

§ 232. The power of the general government to acquire lands within the limits of a State, may be exercised upon such terms and conditions as may be imposed by the States and assented to by the United States, provided that the terms are not inconsistent with the effective use of the property for the purposes intended. (*Fort Leavenworth Railroad Company v. Lowe*, 114 U. S. 525.)



## CHAPTER XX.

### GENERAL POWERS.

#### ART. 1, SEC. 8, PAR. 18.

“The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”

§ 233. The first, second and eighteenth clauses of section eight, article one, are kindred to each other.

The first clause authorizes Congress to levy and collect taxes “for the common defence and general welfare,” the second authorizes Congress to borrow money, and by the eighteenth clause Congress is empowered “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”

§ 234. The gravest political and judicial questions have arisen as to the extent and limits of the powers so granted. In dealing with the first and second clauses, I have referred to some of the decisions of the Court which are pertinent to questions that have been raised under the eighteenth clause.

§ 235. In the opinion of the Court in the case of *M’Culloch* against *Maryland* (4 *Whea.* 316), there are some observations bearing upon the eighteenth clause which were not considered under the first two clauses of this section.

The main questions raised in that controversy were these, viz. : —

(1.) Had Congress power to charter the Bank of the United States, so called, and

(2.) If it had the power, had it also power to exempt it

from taxation by the authorities of the State in which such bank was located?

Reference is made to paragraph 90 for a synopsis of the reasoning of the Court by which the power of Congress is sustained in both particulars.

§ 236. More important even were the declarations by the Court as to the power of Congress to legislate for the general welfare. The doctrine seems to be this, viz.: Wherever there is a grant of a specific power, as the power to borrow money, for example, there is then also granted, under the clause in question, ample power, in the discretion of Congress and not contrary to any other specific provision of the Constitution, to provide the means for the execution of the specific power granted.

§ 237. This doctrine was sustained by Chief Justice Marshall, not only from the text of the Constitution, but also by a process of general reasoning. He asserted that the Constitution was made by the people of the States, and not by the States in their corporate capacity, and that "in form and in substance" it emanated from the people; "that the government of the Union, though limited in its powers, was supreme within its sphere of action."

§ 238. Again he says, "although among the enumerated powers of government, we do not find the word 'bank' or 'incorporation,' we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies." He then proceeds: "It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depend, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution."

§ 239. More recently this doctrine was affirmed in the Legal Tender Cases (U. S. 110, 447). An extract from the opinion by Mr. Justice Strong, in the above case, is quoted in paragraph 117, a portion of which is again cited. "Congress has the power," says Mr. Justice Strong, "to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments."

§ 240. An extract from the opinion of the Court in the case of Hepburn and Griswold may illustrate the distinction between the contending opinions as to the scope of the powers of Congress. In that opinion Chief Justice Chase said: "We are obliged to conclude that an act making mere promises to pay dollars a legal tender in payment of debts previously contracted, is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress; that such an act is inconsistent with the spirit of the Constitution; and that it is prohibited by the Constitution."

§ 241. The doctrine of Chief Justice Marshall and the doctrine announced by Mr. Justice Strong seem to be this:—

The Court cannot restrain Congress in the exercise of its discretion as to the means for the execution of a specific power granted, unless in the exercise of that discretion a *plain provision of the Constitution* is violated. The doctrine announced by Chief Justice Chase seems to be this:—

Whenever the Court shall be of the opinion that Congress has violated the *spirit of the Constitution* in the exercise of its discretion as to the appropriate means of executing a specific power, then it is competent for the Court to declare the law invalid.

The rule laid down by Chief Justice Marshall may now be considered as the rule of interpretation.

## CHAPTER XXI.

### IMPORTATION OF SLAVES.

#### ART. 1, SEC. 9, PAR. 1.

“The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.”

§ 242. This clause, by which the importation of negro slaves was tolerated until the year 1808, disappeared from the Constitution by the lapse of time. The importation of slaves was prohibited by the statute of March 2, 1807 (2 Stat. 426).

## CHAPTER XXII.

### THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS.

#### ART. 1, SEC. 9, PAR. 2.

“The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”

§ 243. This paragraph assumes the existence of the privilege as it had been established in England, recognized in the Colonies, and guaranteed in the charter for the government of the Northwest Territory.

§ 244. In the second article of the Articles of Confederation the privilege of the writ and the power over the privilege were reserved to the several States.

§ 245. In the case of *Ex parte Bollman* (4 Cr. 75), Chief Justice Marshall said, “for the meaning of the term ‘*habeas corpus*,’ resort may unquestionably be had to the common law; but the power to award the writ by any of the Courts of the United States, must be given by written law.”

Hence it has happened that the same question, resting usually upon differing facts, has been before the Courts in many cases, viz.: Is there authority in the statutes of the United States for the discharge of the prisoner from custody?

§ 246. It is to be observed that the Constitution is silent as to the branch of the government that is vested with power to suspend the privilege of the writ of *habeas corpus*, but on the twenty-fourth day of September, 1862 (15 Stat. 730), President Lincoln issued a proclamation suspending the privilege during the rebellion as to all persons in prison by military authority. The question having arisen whether under the Constitution he could issue the proclamation, Congress passed an act, March 3, 1863 (12 Stat. 755), which conferred the power upon the President.

§ 247. On the fifteenth day of September, 1863 (13 Stat. 734), the President issued a second proclamation by which he suspended the privilege of the writ throughout the United States, as to all persons detained in custody by the military authorities. Neither in the statute nor in the second proclamation is there any reference to the first proclamation.

§ 248. From these proceedings no safe inference can be drawn as to the legality of the first proclamation.

Manifestly the power to suspend the privilege is vested in the political departments of the government, and it is manifest also that the proclamation must proceed from the President. It may well be doubted, however, whether the power is lodged in the President, for by the act of suspension not only are all the statutes of the country upon the subject rendered inoperative, but the provision of the Constitution, which assumes the existence of the privilege as the birth-right of every citizen, becomes also inoperative for the time being.

This view may derive some support from the fact that the revocation of the proclamation was made in substance, although not in form, by the statute of February 5, 1867 (14 Stat. 385).

§ 249. Under the fourteenth section of the Judiciary Act of 1789, which is now in force, it was held in the case of *Ex parte Dorr* (3 How. 103), that the Courts of the United States had no power by virtue of the writ of *habeas corpus* to bring up a prisoner held in custody by a State process, except to testify as a witness.

§ 250. A conflict of jurisdiction arose in the State of Wisconsin between the Courts of the State and the Courts of the United States. (*Ableman v. Booth* and *The United States v. Booth*, 21 How. 506.)

Booth was arrested under the fugitive slave law, charged with having aided a slave to escape from the marshal, and was brought before a commission of the United States District Court. In default of bail he was detained in custody.

Upon petitions for a writ of *habeas corpus*, and after hearing by a judge of the State Court, the writ was granted.

§ 251. Thereupon the marshal applied to the Supreme Court of the State for a writ of *certiorari*, and praying that the proceedings might be brought before that Court for revision. Upon the final hearing the Supreme Court sustained the Court below.

§ 252. By writ of error to the Supreme Court of Wisconsin the case was brought to the Supreme Court of the United States.

At the conclusion of a lengthy opinion, Chief Justice Taney, speaking of the district of the United States for the State of Wisconsin said, "as regards the decision of the District Court, it had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings, nor the validity of its sentence, could be called in question in any other Court, either of a State or of the United States, by *habeas corpus* or any other process."

The same doctrine was maintained in Tarble's case (13 Wall. 397).

§ 253. An important question was decided in the case of *Ex parte Vallandigham* (1 Wall. 243), viz.: Has the Supreme Court of the United States original power, by writ of *certiorari*, to bring up the record of a military commission for review and judgment as to the validity of the proceedings? In the case under consideration the petitioner had been arrested by virtue of an order issued by General Burnside, then commanding the military department of Ohio, tried by a military commission, and found guilty of publicly uttering disloyal sentiments and opinions. He was sentenced to imprisonment, and at the date of the petition he was suffering the penalty.

§ 254. Mr. Justice Wayne delivered the opinion of the Court. Having first stated the distinction between the powers of the Courts of England and of the United States as to jurisdiction over military tribunals, he declared that

the appellate powers of the Supreme Court must be subject to the regulations made by Congress; that a military commission was not a Court under the fourteenth section of the Judiciary Act of 1790; that the Supreme Court had not original jurisdiction in an application for the writ of *habeas corpus*; that a writ of *certiorari* could only be addressed to an inferior Court, and, therefore, that the petition must be dismissed.

§ 255. If Vallandigham had made his petition to the District or Circuit Court of Ohio, the question of jurisdiction might have been avoided. (*Ex parte* Reed, 100 U. S. 13.) In the latter case the petition was filed in the Circuit Court at Massachusetts, and upon the refusal of that Court to grant the writ, the Supreme Court, upon petition and prayer for the writ of *certiorari*, took jurisdiction of the case. The consideration of the question whether a court-martial was a Court inferior to the Supreme Court was thus avoided, the prayer being for the record of the Circuit Court.

§ 256. In the opinion given by Mr. Justice Swayne, the extent of the authority of the Supreme Court over courts-martial is set forth. It can inquire whether the court-martial had jurisdiction over the case as set forth in the charges and specifications, and also whether it had jurisdiction over the person of the accused; and, then, whether the sentence was one which the Court could pronounce as due punishment for the offences charged.

As to the intermediate proceedings their legality must be presumed.

In fine, that the Court could not inquire whether the proceedings might or might not be voidable, they must be absolutely void upon the face of the record, or the prayer of the petition must be denied.

§ 257. "The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the Court decides whether the party applying is denied the right



of proceeding any further with it." (*Ex parte* Milligan, 4 Wall. 2, 131.)

§ 258. Upon a petition for the writ of *habeas corpus* in behalf of one Tobias Watkins who was in prison under a sentence pronounced upon him by the Circuit Court of Washington, the Supreme Court said: "Without looking into the indictments under which the prosecution against the petitioner was conducted, we are unanimously of the opinion that the judgment of a Court of general criminal jurisdiction justifies his imprisonment, and that the writ of *habeas corpus* ought not to be awarded." (*Ex parte* Watkins, 3 Pet. 193.)

§ 259. At the January term, 1840, the Court divided upon the question of granting the writ of *habeas corpus* upon the petition of George Holmes, who was held in custody upon the order of the governor of Vermont. Holmes had been indicted for murder in Canada, and upon a requisition from the Canadian authorities he had been arrested in Vermont, and his surrender had been ordered by the governor. Thereupon Holmes made application to the Supreme Court of the State for a writ of *habeas corpus*. The Court refused to grant the writ, and thereupon, by writ of error, the case was brought to the Supreme Court. The Court was divided, but Justices Story, M'Lean, and Wayne concurred in the opinion that was delivered by Chief Justice Taney, in which these propositions were maintained, viz.:—

- (1.) That the proceeding was a suit:—
- (2.) That the power to decide whether a fugitive from a foreign nation should be surrendered was a power vested by the Constitution in the general government exclusively:—
- (3.) That it was one of the powers which the States were forbidden to exercise without the consent of Congress:—
- (4.) That the authority exercised by the governor had been drawn in question in the highest Court of law of the State, upon the ground that it was repugnant to the

Constitution of the United States; and the decision being in favor of the authority exercised, the case was within the jurisdiction of the Supreme Court of the United States by virtue of the twenty-fifth section of the Judiciary Act of 1789.

§ 260. As a conclusion the four justices were of opinion that the judgment of the Supreme Court of Vermont should be reversed, and that Holmes was entitled to his discharge.

These propositions, with the exception of the first, did not receive the support of the other members of the Court, and the writ of error was dismissed for want of jurisdiction. (14 Pet. 540.)

§ 261. The history of this case is instructive, chiefly, as having led the way to the legal conclusion, and the practical result, as a public policy, that a State cannot of its own motion surrender fugitives upon requisitions from foreign nations. (Wharton's International Law, Chap. XI. 275.)

## CHAPTER XXIII.

### BILLS OF ATTAINDER AND EXPOST FACTO LAWS.

#### ART. 1, SEC. 9, CL. 3.

“No Bill of Attainder or expost facto laws shall be passed.”

§ 262. In a few cases State statutes have been treated by the Court as bills of attainder, and in some cases as expost facto laws, although they were not so regarded by the States when the laws were passed.

§ 263. An early case is that of Fletcher against Peck (6 Cranch, 87).

The State of Georgia made a grant of certain Indian lands, by virtue of a statute in which, as the Court found, the State had such a title as to furnish a basis for a grant. Peck, it seems, although not an original grantee, had become an owner, without knowledge of any cloud upon the title.

§ 264. He sold to Fletcher with a covenant that the Legislature at the time of passing the act authorizing the grant “had good right to sell and dispose of the same in the manner pointed out in the act.”

§ 265. After the grant was made and in consequence, as was alleged, of the charge that members of the Legislature that passed the act, had been influenced by promises of interests in the granted premises, the Legislature repealed the law and annulled the grant.

§ 266. These proceedings gave rise to several important rulings and decisions by the Court. Among them these may be cited, viz.:—

“The Legislature of Georgia was a party to the transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindi-

cation in a train of reasoning not often heard in courts of justice":—

"That the question of fact whether the Legislature which passed the original act was corrupted could not be brought 'collaterally and incidentally' before the Court;

"That the lands in controversy vested absolutely in the original grantees, by the conveyance of the governor, in pursuance of an act of the assembly to which the Legislature was fully competent;

"That the grant was a contract, the obligation of which still continued;

"That the rescinding act had the effect of an *expost facto* law. — Said the Court, 'it forfeits the estates of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *expost facto* law, or bill of attainder; why then is it allowable in the form of a law annulling the original grant?'"

§ 267. Again, the provision of the Constitution was more fully considered in the case of Cummings against the State of Missouri (4 Wall. 277). The plaintiff in error was a Catholic priest who had been convicted of preaching without having first taken the oath prescribed by the Constitution of the State which required every minister, and many other persons engaged in certain pursuits and professions, to take an oath that in none of many ways specified had they given aid and comfort to the Rebellion or sympathized with those engaged in the Rebellion. For this neglect he was fined five hundred dollars, and for non-payment he was imprisoned.

§ 268. The provisions of the State Constitution were declared to be in conflict with the Constitution of the United States, and void, consequently, and upon the grounds following, viz.:—

(1.) As imposing a penalty upon acts which were not punishable when the acts were committed.

(2.) As imposing additional punishments to those prescribed when the acts were committed.

These features warranted the legal conclusion that the provision of the State Constitution was in effect an *expost facto* law.

§ 269. Next, inasmuch as the provision inflicted a penalty by a legislative act, and without trial by judicial process, the result was equivalent to a bill of attainder, and therefore void.

§ 270. From this decision, and also from the decision in the case of *ex parte* Garland (4 Wall. 333), Chief Justice Chase, Justices Swayne, Davis and Miller dissented.

In the latter case, and by a similar process of reasoning, the Court decided that a statute which required attorneys of the Courts of the United States to take an oath that they had not given aid to the Rebellion in certain specified ways, was a penalty imposed by the legislative will, and consequently that it was unconstitutional and void.

§ 271. A law passed after the commission of an offence, and which in relation to the offence or to its consequences alters the situation of the accused to his disadvantage, is an *expost facto* law, and void. (*Kring v. Missouri*, 107 U. S. 221.)

§ 272. A statute which enlarges the class of persons competent to testify is not an *expost facto* law, although passed after the offences to which the testimony relates were committed. (*Hopt v. Utah*, 110 U. S. 574.)

§ 273. The opinions given in the several cases cited contain very full expositions of the nature of *expost facto* laws, the distinction between such laws and retrospective acts, the history of bills of attainder and a specification of the tests by which they may be distinguished from other legislative acts.

## CHAPTER XXIV.

### CAPITATION AND DIRECT TAXES.

#### ART. 1, SEC. 9, PAR. 4.

“No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.”

§ 274. Under this clause of the Constitution two questions of importance have been raised, considered and settled.

Under the act of 1864 “to provide internal revenue to support the government,” a “license tax,” subsequently designated a “special tax,” was imposed upon various kinds of business, including the sale of spirituous liquors and lottery tickets.

§ 275. In New York and New Jersey the sale of lottery tickets was forbidden, and in Massachusetts the sale of spirituous liquors was forbidden except in special cases.

In each of these States persons who had engaged in the prohibited pursuits were indicted in the Circuit Courts of the United States for non-payment of the special tax levied under the laws of the United States.

§ 276. In each of the cases a demurrer was filed, and upon the ground that the acts were characterized in the State statutes as crimes, either *malum in se* or *malum prohibitum*, and that Congress could not authorize that to be done in a State which by the laws of the State was made criminal. It was contended by the counsel for the defendants that “in this repugnancy between an act of Congress raising a revenue from crime in a State, and the legislation of the State suppressing the crime, there can be no doubt of the supremacy of State legislation.”

§ 277. On the issue thus raised the Court held that the statute of the United States neither authorized nor prohibited the kinds of business named, but that the tax was levied for purposes of revenue, and that without regard to the legality or illegality of the business under State laws.

Finally, the Court held that the acts of Congress of 1864 and 1866 were in harmony with the Constitution, and with sound public policy. (License Tax Cases, 5 Wall. 462.)

§ 278. The city of Little Rock, Arkansas, having authorized the issue of its notes to the amount of \$160,000, the same were issued and put into circulation as currency by the Merchants' National Bank of that city.

A tax of ten per cent upon said sum was levied upon the bank under section 3413 of the Revised Statutes, which provides as follows: "Every national banking association, State bank, or banker, or association, shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation, paid out by them."

§ 279. It was contended by the defendant bank that the city of Little Rock was a municipality and a part of the State government, and that under the decisions which had been made, exempting officers of a State and other instrumentalities of a State government from taxation by the general government, the city of Little Rock, as a part of the State of Arkansas, was not liable to taxation upon its issue of notes as a means of borrowing money.

§ 280. As in the earlier case of the *Veazie Bank* against *Fenno* (8 Wall. 533), the Court held that as Congress, "in the exercise of undisputed constitutional powers had undertaken to provide a currency for the whole country," it might "restrain, by suitable enactments, the circulation as money of any notes not issued by its authority." (*National Bank v. United States*, 101 U. S. 1.)

§ 281. If the point had been sound that the city of Little Rock was a part of the State of Arkansas in its character as

a sovereign State, it would have followed that the issue of the notes in question would have been unconstitutional as an emission of "bills of credit" by State authority. (*Craig v. The State of Missouri*, 4 Pet. 410; *Byrne v. State of Missouri*, 8 Pet. 40.)

As early as the year 1796, in the case of *Hylton* against the United States (3 Dall., 171), the Supreme Court held that a tax on carriages was not a direct tax under the constitution.

In the case of *Springer* against the United States (102 U. S., 586), the Court decided that an income tax was constitutional, and that the only taxes that were "direct taxes" under the constitution were capitation taxes and taxes on real estate.

It was held in the *Head Money* cases that a tax was uniform when the levy was equal upon the same subject matter wherever found. (112 U. S., 580.)

During the term of the Supreme Court for the year 1894-5, two cases were decided by which the conclusions reached in the case of *Hylton* and in the case of *Springer* have been reversed. (*Pollok v. The Farmers' Loan and Trust Company*, and *Lewis H. Hyde v. The Continental Trust Company*.)

In these cases it has been held, by a divided court, that a tax upon the rent or income of land and a tax upon the income of personal estate are direct taxes, and can only be assessed upon the States and by the rule of apportionment.



## CHAPTER XXV.

### TAX ON EXPORTS.

#### ART. 1, SEC. 9, PAR. 5.

“No tax or duty shall be laid on articles exported from any State.”

§ 282. The State of Pennsylvania, by an act passed in 1803, made certain regulations in regard to pilots and pilotage on all vessels exceeding seventy-five tons burthen, and sailing from or bound to any port not within the River Delaware. In the case of *Cooley* against the Board of Wardens of Port of Philadelphia (12 How. 299), two questions under the Constitution were raised and considered, viz. :—

(1.) Were the pilot fees prescribed a tax or duty on articles exported from the State, and, consequently, a violation of clause five, section nine, article one of the Constitution?

(2.) Was the statute an infringement upon the power of Congress to regulate commerce with foreign nations and among the several States?

§ 283. To each of these questions the Court gave a negative answer. The answer to the first question was absolute and unconditional.

§ 284. As to the second question, the exclusive power of Congress to legislate upon the subject of pilots and pilotage was asserted, but the statute of Pennsylvania was sustained as warranted by the statute of 1789. (1 Stat. 54.) That statute which is now in force (R. S. 4235) provides that all pilots “shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for that purpose.”

§ 285. Said the Court, through Mr. Justice Curtis, “the

power to regulate commerce embraces a vast field containing not only many, but exceedingly various subjects, quite unlike in their nature." . . . "Whatever subjects of this power are in their nature national, or admit only of one uniform system, a plan of regulation may justly be said to be of such a nature as to require exclusive legislation by Congress.

"That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain."

§ 286. By the internal revenue act of 1868 (15 Stat. 157) and the act of 1872 (17 Stat. 254), a stamp tax was levied upon tobacco intended for export.

By the suit by Page against Burgess, Collector (92 U. S. 372), an attempt was made to recover the stamp tax so paid, upon the ground that the tax was a tax on exports and a violation of the fifth clause of the ninth section of article one of the Constitution, which provides that "no tax or duty shall be laid on articles exported from any State."

§ 287. It was claimed that the tobacco so set apart for exportation was exempted from the duty imposed upon tobacco destined for home consumption. The Court held that the stamp tax was only a proper fee "accruing in the due administration of the laws and regulations necessary to be observed to protect the government from imposition and fraud likely to be committed under pretence of exportation," and was in no sense a duty on exportation.

§ 288. In the case of *Munn* against the State of Illinois (94 U. S. 113), speaking of the ninth section of the first article of the Constitution, the Court say that the provisions operate only as a limitation of the powers of Congress, and in no respect affect the States in the regulation of their domestic affairs. (p. 135.)

## CHAPTER XXVI.

### BILLS OF CREDIT.

#### ART. 1, SEC. 10, PAR. 1.

"No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex-post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

§ 289. By the first clause of section ten, article one, States are inhibited from issuing "bills of credit." In the case of *Craig against the State of Missouri* (4 Pet. 410) the Court defined "bills of credit." The case arose upon a note, the consideration for which was certain notes or certificates varying in amount from fifty cents to ten dollars, issued by the State of Missouri, and which were made receivable for all State, county and town dues, and by "all tax-gatherers and other public officers in payment of taxes or other moneys now due to the State, or to any county or town therein." It was also declared that "the said certificates should be received by all officers, civil and military, in the State, in the discharge of salaries and fees of office."

§ 290. The majority of the Court, by Chief Justice Marshall, said, "the consideration of this note is the emission of bills of credit by the State. The very act which constitutes the consideration is the act of emitting bills of credit in the mode prescribed by the law of Missouri; which act is prohibited by the Constitution of the United States."

§ 291. From this decision the conclusion is to be drawn that any obligation issued by a State which is designed for use as currency, and which has capacity for such use, is a

“bill of credit,” and as such it is prohibited by the Constitution.

§ 292. In the case of *Briscoe against the Bank of the Commonwealth of Kentucky* (11 Pet. 257) the Court said, “to constitute a bill of credit within the Constitution it must be issued by a State, on the faith of the State, and be designed to circulate as money.” “It must be a paper that circulates on the credit of the State, and is so received and used in the ordinary business of life.” (p. 318.)

§ 293. The State of Alabama incorporated a bank under the name and style of “The Branch of the Bank of the State of Alabama, at Mobile,” and authorized the issue of notes designed to circulate as money. In the case of *Darrington v. The State Bank of Alabama* (13 How. 12) the point was made that the notes so issued were in fact bills of credit.

§ 294. The admitted facts were these: That the capital stock was owned by the State; that it had been duly paid; that the directors and president were elected by the Legislature; that they had the powers usually possessed by the directors of banks; that the notes were signed by the president and cashier; that the funds and capital of the bank were liable for their redemption; but, finally, that the credit of the State was pledged for their redemption.

The Court held that the notes so issued were not bills of credit.

## CHAPTER XXVII.

### EXPOST FACTO LAWS.

§ 295. The nature of *expost facto* laws has been considered, incidentally, in connection with bills of attainder, but a more definite view may be given under the clause which denies to States the power to pass laws of that character.

§ 296. In the case of *Calder against Bull* (3 Dall. 386) the Court entered very fully into the history of *expost facto* laws, and held that not all laws which are retrospective are therefore *expost facto* in contemplation of the Constitution, but those only which relate to criminal offences; and as to such offences those laws only are *expost facto* which are marked by some one of four features, viz.:—

(1.) Every law that makes an act criminal which was not criminal when the act was done, and provides for the punishment of the act;

(2.) Every law that aggravates a crime, or makes it greater than it was when committed;

(3.) Every law that changes the punishment, and provides for a greater punishment than the law annexed to the crime when it was committed;

(4.) Every law that alters the rules of evidence and receives less or different testimony than the law required at the time of the commission of the offence to the disadvantage of the accused, are *expost facto* laws in contemplation of the inhibition imposed upon the States.

§ 297. The same doctrine was set forth and maintained in the case of *Cummings against the State of Missouri* (4 Wall. 277) and in the case of *ex parte Garland* (4 Wall. 333), both of which have been considered under the clause of the Constitution relating to bills of attainder.

§ 298. Following the close of the war the State of Missouri changed its Constitution, by which ministers and persons engaged in other vocations were required to take an oath absolving themselves from all participation in the Rebellion as a condition precedent to the exercise of any power or the performance of any function in office.

Cummings, a priest of the Catholic Church, neglected to take the oath, and yet he continued to perform the functions of his office. He was subjected to a fine of five hundred dollars.

The sentence having been affirmed by the Supreme Court of the State, the case came to the Supreme Court of the United States by writ of error.

By a divided Court, and by a majority only, the decision of the Supreme Court of Missouri was reversed, and upon the ground that the provision in the Constitution of the State was in its nature an *expost facto* law, and, consequently, it was inhibited by the Constitution of the United States.

§ 299. An act of Congress of January 24, 1865 (13 Stat. 424) prescribed a test oath for attorneys of the Courts of the United States. (12 Stat. 502.) By that oath the affiant was required to declare that he had never voluntarily borne arms against the United States, had never given aid to persons in armed hostility thereto, and had never held office under any government or authority in hostility to the United States.

Mr. Garland, the petitioner, and a citizen of the State of Arkansas, had been admitted to practice in the Supreme Court of the United States in the year 1860. During the war of the Rebellion he was a member of the Confederate Congress, and consequently he was unable to take the oath prescribed.

§ 300. The Court, by Mr. Justice Field, said, "The statute is directed against parties who have offended in any of the particulars embraced by these clauses.

“As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion; and exclusion from any of the professions or any of the ordinary avocations of life for past conduct, can be regarded in no other light than as punishment for such conduct.” . . . “All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included.” . . . “It adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an *expost facto* law.”

§ 301. The Court held that attorneys were not officers of the United States, but that they were officers of the Court, holding during good behavior, and that conditions could not be imposed by the legislative department.

§ 302. In the case of Garland some reliance was placed upon the fact that he had received a pardon from the President, but the reasoning of the Court seems to justify the conclusion that the requirement of the oath would have been unconstitutional in the case of a party who had not received a pardon, and, in fact, the rule of the Court which required the oath was rescinded as to all persons.

§ 303. The minority of the Court, consisting of Chief Justice Chase and Justices Miller, Swayne and Davis, maintained that as the Courts were of the government, and as the attorneys were by consent officers of the Court, they were, through their relation to the Court, officers of the government, and like other officers they were under the control of the law-making power, as to the qualifications that might be exacted of them as attorneys of the Courts of the United States.

The minority in their dissent state the issue thus:—

They say “that the purpose of the act of Congress was to require loyalty as a qualification of all who prac-

tise law in the national courts. The majority say that the *purpose* was to impose a punishment for past acts of disloyalty."

The position of the Court might be more fairly stated by substituting the word *effect* for the word *purpose*.



## CHAPTER XXVIII.

### AS TO THE OBLIGATION OF CONTRACTS.

#### ART. 1, SEC. 10, PAR. 1.

“No State shall pass any law impairing the obligation of contracts.”

§ 304. Under the provision of the Constitution that no “State shall pass any law impairing the obligation of contracts,” not less than one hundred and thirty cases were heard and disposed of in the Supreme Court during the first century. Of these a small number only were important, as settling questions involving the interpretation of the provision of the Constitution. The case of *Sturges against Crowninshield* (4 Wh. 122) was considered under the clause of the Constitution relating to the power of Congress to pass a bankrupt law, in which it was held that a State was not competent to pass an act by which a debtor should be relieved from the obligation of a contract entered into prior to the passage of the law.

§ 305. One of the important and well-known cases is that of *The Dartmouth College against Woodward* (4 Wh. 518). The trustees of Dartmouth College received a charter from the Crown in the year 1769. It was granted to Rev. Eleazar Wheelock. The charter set forth that he had already established an Indian Charity School, and that for several years, through the assistance of well-disposed persons, he had clothed, maintained and educated a number of the children of the Indian natives. Through the agency of one Whitaker he had obtained contributions of money, and certain persons named in the charter had been made trustees, to hold the moneys which had been contributed for the use of the school.

§ 306. Subsequently, and after the separation of the Colonies from the British government, the State of New Hampshire made grants of land to the college.

§ 307. In the year 1816 the Legislature passed an act in which the name of the college was changed, giving it the title of "The Trustees of Dartmouth University," and in other respects the character of the corporation was altered. By another act passed in the same year, the Legislature made it a penal offence for any person or persons to assume the office of president, trustee, professor, secretary, treasurer, librarian or other officer of Dartmouth University, except in conformity with the first-named act of the Legislature.

§ 308. Thereupon the trustees of Dartmouth College brought an action of trover against Wm. H. Woodward for the books, records, corporate seal and other corporate property to which the plaintiffs claimed title.

These properties were held by Woodward upon the ground that he was entitled to the possession thereof by virtue of the acts of the Legislature before referred to.

§ 309. The questions at issue in the case were these:—

(1.) Was the charter a contract and was it protected by the Constitution of the United States?

(2.) Was it impaired by the acts under which the defendant held possession of the property aforesaid? The Court found that the origin of the institution was in the Indian Charity School established by Dr. Wheelock at his own expense, and that it was at his instance, and for the enlargement of the school, that contributions were solicited and obtained in England. Further, that the charter of the corporation was granted at his instance, and that the persons named by him in his last will as trustees of the school, composed a part of the corporation and of which he had been declared to be the founder and its president for life.

§ 310. The Court held that the college, whether founded by Dr. Wheelock or not, was founded by private individuals, was a private corporation, and that the grants made

and donations given, whether by the State or by individuals, were grants and gifts upon the foundation which had been laid by Dr. Wheelock; that the charter and its acceptance constituted a contract, the obligation of which could not be impaired without violating the Constitution of the United States. Consequently, it was held that the acts of the Legislature of New Hampshire were repugnant to the Constitution of the United States and that the judgment of the Supreme Court of the State of New Hampshire ought to have been for the plaintiffs.

§ 311. The opinion of the Court was given by Chief Justice Marshall, and concurred in by all the Justices except Justice Duvall. The decision was sustained in separate opinions by Justice Washington and Justice Story. The soundness of the reasoning and the constitutionality of the conclusions reached, have been questioned from time to time, but in not less than twenty-five cases that have been passed upon by the Supreme Court, the decision in the Dartmouth College case has been sustained either directly or indirectly.

§ 312. In the case of *Owings against Speed et al.* (5 Wh. 420) the Court decided that the Constitution of the United States came into operation on the first Wednesday in March, 1789. It was held also that the provision of the Constitution that no State shall make any law impairing the obligation of contracts does not extend to a State law enacted before that day and operating upon the rights of property vested before that day.

§ 313. When the territory of Kentucky was separated from Virginia, an agreement was entered into between Kentucky and Virginia in these words, namely: "That all private rights and interests in lands within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State."

§ 314. In the years 1797 and 1812 the Legislature of Kentucky passed certain acts affecting the titles of lands in the

State of Kentucky, that were described in the stipulation which has been cited. The important provision in the statute of 1812 which became the subject of controversy, declared that where a party had gone upon lands of the character specified, and had made improvements thereon, the rightful owner, whenever he should reclaim possession of such lands, should pay to the occupant the value of the improvements. The Court held that the stipulation between Kentucky and Virginia was a contract between the States for the benefit of the parties interested in the lands, and that the conditions imposed by the Legislature of the State of Kentucky were in violation of the Constitution of the United States and consequently void. The point was made in the argument that the stipulation was defective, inasmuch as the record did not show that the Government of the United States had given its assent thereto. The Court held, however, that assent was to be presumed from the fact that the division of territory and the organization of the State of Kentucky had been ratified by the Government of the United States. (*Greene v. Biddle*, 8 Wh. 1.)

§ 315. The decision of the Court in *Ogden against Saunders* (12 Wh. 213) was considered under the clause of the Constitution relating to bankruptcy. In that case the Court held that it was competent for a State to provide a system of bankruptcy by which debtors should be discharged from the obligation of contracts made subsequent to the passage of the statute, and that such legislative acts were not in conflict with the Constitution, which prohibits States passing laws impairing the obligation of contracts.

§ 316. In two early cases the Court held that it was competent for a State by legislative enactment to make valid a contract that otherwise was void, and that such legislation did not impair the obligation of contracts within the meaning of the Constitution of the United States. (*Satterlee v. Matthewson*, 2 Pet. 380, and *Watson v. Mercer*, 8 Pet. 88.)

§ 317. That the obligation of the contracts of a corpora-

tion is not impaired by its dissolution was held in the case of Mumma against the Potomac Company (8 Pet. 281), and in the same case it was also held that it was competent for a State to provide for the distribution among its creditors of the assets of a dissolved corporation.

§ 318. In the year 1650 the Legislature of Massachusetts granted to the president of Harvard College the liberty and power to dispose of the ferry from Charlestown to Boston, by lease or otherwise, for the benefit of the college. Under that grant the college continued to hold and operate the ferry by its lessees and agents, and to receive the profits thereof until 1785. In that year an arrangement was made by which certain parties obtained a charter with authority to erect a bridge on the line of the ferry, and with power to charge tolls for use of the bridge. Under this arrangement the corporators of the bridge agreed to pay to Harvard College the sum of two hundred pounds per year, which sum was thereafter regularly paid.

§ 319. In the year 1828 the Legislature of Massachusetts incorporated a company by the name of "The Proprietors of the Warren Bridge" with authority to erect another bridge over Charles River, and so near the former bridge known as the Charles River Bridge as to command a portion of the travel, which otherwise would have passed over the Charles River Bridge.

§ 320. By the terms of the charter the Warren Bridge was to become free, whenever the cost to the proprietors should have been reimbursed, and in any event at the end of six years from the day the company commenced receiving toll.

§ 321. The Supreme Court of Massachusetts having sustained the validity of the charter granted to the Warren Bridge Company, the case was brought by writ of error to the Supreme Court of the United States.

Inasmuch as the charter granted to the proprietors of the Charles River Bridge did not contain a stipulation that

the State would not authorize another bridge to be built, to the injury of that corporation, the Court held that a contract could not be implied, and that the law empowering another corporation to erect and maintain a free bridge so near to the first as to practically deprive the first corporation of all tolls, was not a law impairing the obligation of any contract.

§ 322. The decision rested largely upon the rule of construction that in a contract between the public and individuals, the individuals can claim nothing as against the public that is not clearly given to them by the granting act.

§ 323. Mr. Justice Story in his dissenting opinion said: "I maintain that upon the principles of common reason and legal interpretation, the present grant carries with it the necessary implication that the Legislature shall do no act to destroy or essentially to impair the franchise. In other words, the State impliedly contracts not to resume its grant, nor to do any act to the prejudice or destructive of its grant."

§ 324. It thus appears that the decision of the Court rested upon the theory that in the construction of a contract between the public and individuals nothing could be implied as against the rights of the public, while, on the other hand, Justice Story and Justice Thompson, who concurred with Justice Story, maintained the doctrine that there was an implication to be reasonably and properly drawn from the grant made to the Charles River Bridge Company, that the State would neither do nor authorize other persons to do any act or thing which should impair the value of the franchise granted to the Charles River Bridge Company. (*Charles River Bridge v. Warren Bridge*, 11 Pet. 420.)

§ 325. The Legislature of the State of Illinois, by a statute passed in the year 1841, enacted that parties whose lands should be sold on execution after that law took effect, should have the privilege of redeeming them within twelve months from the day of sale, upon the repayment of the purchase money with interest at the rate of ten per cent.

§ 326. In the case that was brought to the Supreme Court

(*Bronson v. Kinzie*, 1 How. 311) it appeared that Kinzie had made a mortgage to Bronson of a certain estate in Chicago, which mortgage contained the covenant that if default should be made of the payment of principal and interest, or any part thereof, it should be lawful for Bronson or his representatives to enter upon and sell the mortgaged premises at public auction, and, as attorney for Kinzie and wife, to convey the same to the purchaser; and out of the moneys arising from such sale, to retain the amount that might then be due him, on the aforesaid mortgage, with the costs and charges of sale, rendering the overplus, if any, to Kinzie. The case came to the Supreme Court upon a division of opinion in the Circuit Court of the United States, for the district of Illinois, and the Supreme Court held that the statute in question so altered the remedy of the creditor as to impair the obligation of the contract.

§ 327. Again the Court held that a State law that prohibiting the sale of property on execution for less than two-thirds of the valuation made by appraisers, impaired the obligation of preëxisting contracts, and so was inoperative upon executions issued on judgments, founded on such contracts. (*McCracken v. Hayward*, 2 How. 608.)

§ 328. The State of Maryland having accepted from the Union Bank of the city of Baltimore a bonus as a consideration of the franchise granted, and having pledged the faith of the State not to impose any further burden upon the bank during the continuance of its charter, it was held that a tax upon the stockholders, and upon the stock so held by them, was a violation of the contract. (*Gordon v. Appeal Tax Court*, 3 How. 133.)

§ 329. The Legislature of the State of Arkansas having chartered a banking corporation, of which the State was to be the sole stockholder, and having provided in its charter that the bills and notes of the institution should be received in all payments of debts due to the State, it was held that that stipulation constituted a contract with the holders of

all bills so issued, that the State was bound to receive the same in payment of dues, and that a subsequent statute repealing that clause in the charter was unconstitutional as impairing the obligation of the contract. (*Woodruff v. Trapnall*, 10 How. 190.)

§ 330. The State Bank of Arkansas, whose stock was owned by the State, having become insolvent, the Supreme Court held that its effects were a trust fund for the payment of its creditors, who might follow the funds into the hands of any one not a *bona fide* creditor or purchaser without notice. It was also held that a State law which deprived creditors of that right, and appropriated the property to other uses, impaired the obligation of the contracts and was invalid. It was also held that the same rule was applicable where the State was a stockholder, as in cases where the stock was owned by private parties. (*Curran v. State of Arkansas*, 15 How. 304.) (See also *Barings v. Dabney*, 19 Wall. 1.)

§ 331. In the case of *Beers* against the State of Arkansas it was held that the consent given by a State, whether by the Constitution or by a statute, that it may be sued in its own courts, is not a contract. (20 How. 527.)

§ 332. The State of Pennsylvania, in consideration of the "previous usefulness of Christ Church Hospital and the decay of its buildings and embarrassment for funds," enacted that the said property, including grounds and rents, so long as the same shall belong to said hospital, shall be and remain free from taxes. By a subsequent statute the State subjected the property to taxation. The managers of the hospital claimed that the imposition of taxes in the presence of the stipulation contained in the first act, was a violation of the contract between the managers of the hospital and the State, and consequently repugnant to the Constitution of the United States.

§ 333. The Court overruled the plea, and upon the ground that the concession of the Legislature was spontaneous, and



that no service or duty or other remunerative condition was imposed upon the corporation. It was held also that there was no implication from the facts that the concession was to be perpetual or destined to continue during the corporative existence of the hospital, and that a broad interpretation was not to be favored, as the power of taxation is necessary to the existence of the State, and must be exerted according to the various conditions of the commonwealth. The Court relied upon the declaration in the original statute of the reason for the grant, and also upon the fact that the time that had elapsed between the date of the first statute and the date of the second justified the conclusion that the buildings had been renovated, and that the embarrassment for funds had been overcome. (*Rector of Christ Church v. The County of Philadelphia*, 24 How. 300.)

§ 334. It is declared in the opinion of the Court in the case of the Jefferson Branch Bank against Skelly (1 Black, 436) that the construction given by the Courts of the States to State Constitutions is conclusive, except when the Supreme Court is called upon to decide whether a legislative act or a provision of a State Constitution creates a contract.

§ 335. The Binghamton Bridge case (3 Wall. 51) led the Court to a decision in harmony with the decision made in the Dartmouth College case. In the year 1805 the Legislature of the State of New York passed an act to establish a turnpike corporation, which contained this provision, namely: "It shall not be lawful for any person or persons to erect any bridge or establish any ferry across the said west and east branches of the Delaware River within two miles, either above or below the bridges to be erected and maintained in pursuance of this act." Subsequently an act was passed authorizing the construction of a bridge across the Delaware River at Binghamton, and within the limit of two miles from the line established by the charter to the Delaware Bridge Company first mentioned.

§ 336. In the opinion of the Court given by Mr. Justice Davis, it is said that the Dartmouth College case had, ever since its decision, "been considered a landmark by the profession, and no Court has since disregarded the doctrine that the charters of private corporations are contracts protected from invasion by the Constitution of the United States. And it has since so often received the solemn sanction of this Court that it would unnecessarily lengthen the opinion to refer to the cases, or even to enumerate them." Following that decision, the Court held that the charter granted to the Binghamton Bridge Company was null and void. Chief Justice Chase and Justices Field and Grier dissented from the opinion, but not upon the ground that the law set forth in the decision was unsound, but that it was not applicable to the case at bar. The difference of opinion seems to have arisen from the fact that the original bridge was constructed across the two branches of the Delaware River, which form a junction at about three-quarters of a mile below the bridge, and the question was whether the limitation in the original charter was confined to the two rivers, or whether the two miles were applicable to the Delaware River after the union.

§ 337. By the authority of the Legislature of Illinois a statute was passed by which the city of Quincy was authorized to issue bonds, coupled with a grant of specified power of local taxation for the payment. By a subsequent statute it was provided "That no more than eighteen cents on each one hundred dollars aforesaid shall be levied in any year for such purposes, without the concurrence of a majority of the votes of legal voters of said city." This condition worked a limitation of the power of the authorities of the city to levy taxes for the payment of said bonds, and the Court held that the power of taxation thus given was a contract within the meaning of the Constitution, and could not be withdrawn until the contract was performed. It was held also that the State and the corporation were equally bound

to the performance of the contract. (*Von Hoffman v. City of Quincy*, 4 Wall. 535; *Wolff v. New Orleans*, 103 U. S. 358.)

§ 338. The doctrine of the Dartmouth College case was again sustained in the case of *The Home of the Friendless* against Rouse (8 Wall. 430). In the year 1853 the Legislature of the State of Missouri passed an act to incorporate "The Home of the Friendless." The preamble set forth that certain women of the city of St. Louis, from their private means, had undertaken to establish a home for the relief of destitute and suffering females, and the first section of the act declared that certain property, including lands that might be owned by the said corporation, should be exempted from taxation.

§ 339. Under the Constitution of the State adopted in the year 1865 the Legislature imposed a tax upon the property of the aforesaid corporation. The legality of the tax was contested, and the Court held that the "State of Missouri made a contract on sufficient consideration with the 'Home of the Friendless' to exempt the property of the corporation from taxation, and that the attempt made on behalf of the State through its authorized agents, notwithstanding the agreement to compel it to pay taxes, was an indirect mode of impairing the obligation of the contract, and could not be allowed."

§ 340. In the case of *White against Hart* (13 Wall. 646) the Court held that the rebellious States were at no time out of the Union, that their Constitution, duties and obligations remained unaffected by the Rebellion, and they could not, during the period of the Rebellion, pass a law impairing the obligation of a contract.

§ 341. In the case at bar the consideration of the contract was a slave; but the Court held that that fact was of no value in determining the legality of the provision in the Constitution of the State of Georgia of 1868, which provided that "No Court or officer shall have, nor shall the General Assembly give jurisdiction to try, or give judgment on, or

enforce any debt, the consideration of which was a slave, or the hire thereof." A similar doctrine was maintained in the case of *Osborn against Nicholson* (13 Wall. 654).

§ 342. The State of Georgia having passed an act that in all suits pending on any contract made before the first day of June, 1865, it should not be lawful for the plaintiff to have a verdict unless he made it appear that the taxes chargeable by law on the same had been duly paid for each year since the making of the same, the Court held that this imposition changed the nature of the contract from what it was under the law when the same was made, and consequently that it was a violation of the provision of the Constitution of the United States. (*Walker v. Whitehead*, 16 Wall. 314.)

§ 343. A declaration in a legislative act exempting a railway or other corporation or party from taxation, which is not supported by any consideration in return, is merely a gratuity which may be rescinded or annulled at the pleasure of the Legislature. (*Tucker v. Ferguson, et al.*, 22 Wall. 527; *West Wisconsin R. R. Co. v. Supervisors*, 93 U. S. 595.)

§ 344. It is competent for the Legislature of a State to enlarge, limit, or alter the modes of proceeding for enforcing a contract, provided that the remedy be not withheld, nor embarrassed with conditions and restrictions that seriously impair the value of the right. (*Tennessee v. Sneed*, 96 U. S. 69, and *Edwards v. Kearsey*, 96 U. S. 595.)

In *Penniman's* case it was held that a statute abolishing imprisonment for debt did not, in the meaning of the Constitution, impair the obligation of contracts which were entered into previous to its enactment. (103 U. S. 715.)

§ 345. In the case of *Seibert and Lewis* (122 U. S. 284) it was held that a State law which so affects the remedy as to impair, substantially, the value of the contract is forbidden by the Constitution, and consequently is void.

§ 346. The State of Virginia, in conformity to the Funding Act of March 30, 1871, issued bonds with interest coupons attached, whereby the State bound itself to receive them

at maturity for all taxes and demands due the State. In the case of *Antoni against Greenhow* (107 U. S. 769) the Court held that a statute forbidding the receipt of the coupons for taxes and demands would impair the obligation of the contract, and would therefore be void. At the time when the law was passed authorizing the issue of bonds, a holder of coupons had authority by law to sue out a writ of *mandamus*, compelling collectors to receive them in payment of taxes. Subsequently, however, an act was passed by which the right to sue out the writ was withdrawn from creditors. The Court held, against the opinion of the minority, that the change in the law in regard to the right to sue out a writ of *mandamus* did not impair the obligation of the contract between the State and the public creditors, and upon the ground that the taxpayer, although required to pay his taxes in lawful money, had a method of recovery pointed out to him by the statute which was the equivalent of the writ of *mandamus*.

§ 347. In the subsequent case of *Poindexter v. Greenhow* (114 U. S. 270) the Court held that a holder of coupons could make a tender of them in payment of taxes, and thereby place himself upon the footing he would occupy if he had tendered gold coin. (p. 281.) In the case of *Poindexter* the Court said, "he offered them (coupons) and they were refused. He chose to stand upon the defensive, and maintain his rights as they might be assailed. His right was to have his coupons received for taxes when offered. That was the contract. To refuse to receive them was an open breach of its obligation." (299.)

§ 348. In the year 1869 the Legislature of the State of Louisiana granted to the Crescent City Company of New Orleans the exclusive privilege for stock landing and slaughter-houses in that city for twenty-five years. In 1881, under a provision of the Constitution of 1874, the municipal authorities granted a similar privilege for slaughter-houses and stock landing to the Butchers' Union Company.

Thereupon the Crescent City Company commenced a suit against the Butchers' Union in the Circuit Court in the Eastern District of Louisiana, which came by writ of error to the Supreme Court of the United States, and is reported in vol. 111 U. S. page 746. The Court held that the grant in 1869 to the Crescent City Company was in its form and conditions a contract which would have been recognized and operative against subsequent legislation under the provision of the Constitution which declares that States shall not pass laws impairing the obligation of contracts, except for the fact that the grant operated as a restriction upon the police power of the State and city. It was held in substance by the Court that so far as the act of 1869 partook of the nature of an irrevocable contract, the Legislature exceeded its authority, as it had no power to tie the hands of a Legislature of the future and restrain it from legislating on that subject.

§ 349. The decision contains a denial of the power of the Legislature to so establish the right as that no future legislation could repeal or modify the law or grant similar privileges to others. "The denial of the power," says the Court, "in the present instance rests upon the ground that the power of the Legislature intended to be suspended, is so indispensable to the public welfare that it cannot be bargained by contract; it is that well-known but undefined power called the police power." . . . "While we are not prepared to say that the Legislature can make valid contracts on any subject embraced in the largest definitions of the police power, we think that in regard to two subjects there embraced it cannot by any contract limit the exercise of those powers to the prejudice of the general welfare. These are the Public Health and Public Morals."

§ 350. In several cases the Court has held that a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to the Constitution of the United States in the particulars now under consideration. (The cases referred to are *Bartemeyer v. Iowa*, 18 Wall. 129;

Beer Co. *v.* Massachusetts, 97 U. S. 25; Ames *v.* Kansas, 111 U. S. 449; and Foster *v.* Kansas, 112 U. S. 201.)

§ 351. In the case of Wilson against the Black Bird Creek Marsh Co. (2 Pet. 245) the Court sustained the statute of the State of Delaware by which authority was given for the construction of a dam across a navigable creek, upon the ground that the public health would be protected thereby, there being no act of Congress controlling the policy of the State.

§ 352. Contracts made in the insurgent States during the late Civil War between residents of those States, and not designed to aid the insurrectionary governments, have been enforced in the national courts. In such cases the value of the contracts has been determined by the value of the Confederate notes in the lawful money of the United States at the time when, and the place where, such contracts were made.

§ 353. In regard to the contract which was the subject of controversy between Effinger and Kenney (115 U. S. 566), the Supreme Court of Appeals of Virginia held that the plaintiff was entitled to recover the value of the land, which was the subject matter of the contract, and at the time the sale was made. The Supreme Court of the United States held, on the contrary, that recovery was to be based upon the value of Confederate notes in the lawful money of the United States at the time when, and the place where, the contract was made. Consequently an act of the Legislature authorizing a recovery based on the value of the property was unconstitutional, as impairing the obligation of the contract.

§ 354. A legislative grant of the exclusive right to supply gas or water to a municipality and its inhabitants, upon condition of the performance of the service by the grantee, is a grant of a franchise in consideration of the performance of a public service, and after performance by the grantee it becomes a contract, protected by the Constitution of the United States, against State legislation calculated to impair

the contract. (*New Orleans Gas Company v. Louisiana Light Company*, 115 U. S. 650, and *New Orleans Water Works Company v. Rivers*, 115 U. S. 674, and *Louisiana Gas Company v. Citizens' Gas Company*, 115 U. S. 683.)

§ 355. In the case of *Fisk against Jefferson Police Jury* (116 U. S. 131) it was decided that where a law attached a fixed compensation to a public office, during the whole term of service of a person legally filling the office and performing the duties thereof, a perfect implied obligation arose to pay for the services at the fixed rate, to be enforced by the remedies which the law then gave; and that a change in the Constitution, which took away existing powers of taxation, so as to deprive the officer of the means of collecting his compensation, was within the prohibitory clause of the Constitution forbidding the passage of State laws impairing the obligation of contracts.

§ 356. Again, where a law of the State imposes taxes for the purpose of revenue upon persons pursuing lawful occupations and professions, such persons are entitled to a license upon the tender of the license fee, if, in all respects, they have such qualifications as by law or usage may be required. Upon the refusal of a license they may enter upon the practice of the profession, and any law of the State subjecting such persons to criminal proceedings therefor is in conflict with the Constitution of the United States.

§ 357. The Supreme Court has no jurisdiction, by writ of error to the highest Court of the State, on the ground that the obligation of a contract has been impaired, unless some legislative act of the State is upheld by the judgment suit to be reviewed. The provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts is aimed at the legislative power of the States and not at decisions of its Courts, nor acts of executive or administrative boards of officers, or doings of corporations or individuals. (*New Orleans Water Works v. Louisiana Sugar Co.*, 125 U. S. 18.)



## CHAPTER XXIX.

### AS TO IMPOSTS AND DUTIES LEVIED BY STATES.

#### ART. 1, SEC. 10, PAR. 2.

“No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.”

§ 358. A small number of decisions only have been made under the second clause of this section, which denies to States the power to levy duties on imports or exports except what may be absolutely necessary, for executing its inspection laws subject to the condition that all such laws may be revised and controlled by Congress. In the case of *Cooley* against the Board of Wardens of the Port of Philadelphia (12 How. 299) already referred to, the Court held that State laws for the regulation of pilots and pilotage are not laws laying imposts or duties on imports or exports or on tonnage, — if such laws do not pass the appropriate line which limits laws for the regulation of pilots and pilotage.

§ 359. The State of California having imposed a stamp tax on bills of lading for the transportation from any point or place in that State to any point or place without the State, of gold or silver coin or gold dust, or gold or silver bars, the Court held that it was a tax upon a specified class of exports, and forbidden by the clause of the Constitution under consideration, and that the law therefore was void. (*Almy v. State of California*, 24 How. 169.)

§ 360. A State tax levied upon imported goods after the same had passed into the hands of a purchaser, is not in conflict with the clause under consideration, although the goods

at the time of the levy of the tax should be contained in the original packages. (*Waring v. The Mayor*, 8 Wall. 110.)

§ 361. The terms imports and exports do not refer to articles imported from one State to another, but only to articles imported from foreign countries into the United States, or exported from the United States to foreign countries. (*Woodruff v. Parham*, 8 Wall. 123, and *Brown v. Houston*, 114 U. S. 622.)

§ 362. The statute of a State imposing a tax upon the gross receipts of a railroad company is not repugnant to the Constitution of the United States, although the gross receipts are made up in part from freights received on transportation of merchandise from the State to another State, or into the State from another State, nor is it a tax on imports or exports. (*State Tax on Railway Gross Receipts*, 15 Wall. 284.)

## CHAPTER XXX.

### COMPACTS BETWEEN STATES.

#### ART. 1, SEC. 10, PAR. 3.

“No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.”

§ 363. The third clause of the tenth section of the first article of the Constitution contains inhibitions upon the powers of the States which have been brought within the jurisdiction of the Supreme Court, and concerning which opinions have been rendered, namely: Tonnage duties and Compacts between States.

§ 364. The first decision in regard to Compacts is reported in the case of *Greene v. Biddle* (8 Wh. 1). A compact was made between Virginia and Kentucky, when the latter was created a State, to which reference has already been made, and by which private rights and interest in lands within the limits of Kentucky were to remain valid and secure under the laws of Kentucky, and in conformity with the laws existing in the State of Virginia when the separation took place. The point was made that the compact not having received specifically the “consent of Congress,” as required by the clause of the Constitution, was not binding upon the new State. The Court held that it was not necessary that the “consent of Congress” to a compact between two States should be expressed in any particular form, and that when Congress consented to the separation of Kentucky, and its erection into a State, it must be taken to have consented to the compact by which the separation so agreed to was made.

§ 365. Another point was raised in the case of Poole against Fleezer (11 Pet. 185). The Court declared in that case that the power to make a compact between States resided in the several States, although it could be exercised only with the consent of Congress.

§ 366. In the case of Achison against Huddleson (12 How. 293) the Court recognized an existing compact between the United States and the State of Maryland respecting the Cumberland Road. The State of Maryland having imposed upon the mail contractors a tax of four cents for every passenger carried in a mail-coach over that road, the Court held that it was a tax upon the United States, a violation of the compact, and consequently void.

## CHAPTER XXXI.

### TONNAGE DUTIES.

§ 367. The construction of the phrase in regard to tonnage duties has given rise to several controversies and to some very nice distinctions. In the case of *Huse v. Glover* (119 U. S. 543) the Court has defined the meaning of the phrase "duty of tonnage" in these words, namely: "A duty of tonnage within the meaning of the Constitution is a charge upon a vessel according to its tonnage as an instrument of commerce for entering or leaving a port, or navigating on public waters of the country." Under that definition, but previous to its announcement in form, the Court held that a State tax imposed upon vessels at so much per ton of the registered tonnage, was a violation of the provision of the Constitution in regard to tonnage and duties, although it was competent for a State to levy a tax upon vessels as property, according to the valuation of the same. (*State Tonnage Taxes*, 12 Wall. 204.)

§ 368. The city of New Orleans by an ordinance provided that all steamboats which should moor or land in any part of the port of New Orleans should be subject to a duty to be measured by the tonnage of the vessel. This was held to be a violation of the Constitution, and therefore void. The Court said in substance, that any duty or tax or burden imposed under the authority of the States which is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, and which is assessed on a vessel according to its carrying capacity, is a violation of the Constitution, unless the consent of Congress shall have been obtained. (*Cannon v. City of New Orleans*,

20 Wall. 577.) The same doctrine was maintained in the case of the Inman Steamship Company against Tinker (94 U. S. 238).

§ 369. The requirement by the laws of a State that each vessel passing a quarantine station shall pay a fee fixed by the statute, for examination as to her sanitary condition, and an inquiry as to the ports from which she came, is a part of all quarantine systems, is a compensation for service rendered a vessel and is not a tax within the meaning of the Constitution concerning tonnage taxes imposed by the States. (*Morgan v. Louisiana*, 118 U. S. 455.)

§ 370. With stronger reason than in the tonnage tax cases reported in the 12 Wall. 204, the Court say in the case of *Peete* against *Morgan* (19 Wall. 581) that the inhibition against a tonnage duty applies when the vessels are owned by citizens of another State, and are engaged in commerce between States over which Congress has control.

§ 371. A municipal corporation, having by its charter a right to erect wharves on navigable waters may regulate wharfage rates and collect wharfage from the owners of vessels mooring and landing at the wharves and using the same. The charge for such service must be such as is only a fair equivalent for the convenience provided, and in no sense must it be a tax or duty upon commerce or a hindrance to free navigation. The charge for wharfage is regarded as proper compensation for the use of property, and in no sense an assertion on the part of the local authorities of sovereignty over the subject of commerce. (*Packet Company v. Keokuk*, 95 U. S. 80, and in the case of *Ouachita Packet Company v. Aiken*, 121 U. S. 444.)

## CHAPTER XXXII.

### RELATING TO THE ELECTION OF PRESIDENT AND VICE PRESIDENT.

#### ART. 2, SEC. 1, CL. 1, 2, 3.

§ 372. The first section of article two of the Constitution relates to the election of President, to the manner of election, to the persons who are eligible to the office, to the mode of procedure in case of the death, resignation or inability of the President to discharge the powers and duties of the office, to his removal from office, to his compensation and, finally, to the oath that he is to take before he enters upon the execution of his office. The provision in regard to the mode of election by the electors was amended by the substitution for the original text, of the twelfth amendment, which was ratified by the requisite number of States, as appears by the proclamation of the Secretary of State, dated the 25th day of September in the year 1804. Of the provisions of this section of the Constitution, only that relating to the mode of electing electors has been brought before the Supreme Court. Under the authority granted to Congress by the third clause of the section, the time of choosing electors has been made uniform, and occurs on the Tuesday next after the first Monday in November in every fourth year, succeeding every election of a President and Vice President. (R. S. Sec. 131.)

§ 373. The Legislature of Michigan having passed an act for the division of the State into districts for the election of electors, the constitutionality of the statute was considered in the case of *McPherson v. Blacker* (146 U. S. 1). The Court held that the subject was left to the States, except only as to the time when the election should be held.

§ 374. From time to time inquiries have been made as to the authority or reason for the expiration of each Presidential term on the fourth day of March, there having been no statute or constitutional provision under the existing government requiring the practice.

On the 13th of September, 1787, Mr. Johnson of Connecticut, from the Committee on Style, reported to the Federal Convention that formed the Constitution of the United States two resolutions, the second of which is as follows:—

*“Resolved*, That it is the opinion of this Convention that as soon as the Conventions of nine States shall have ratified this Constitution, the United States, in Congress, shall fix a day on which electors shall be appointed by the States which shall have ratified the same, and a day on which the electors shall assemble to vote for President, and the time and place for commencing the proceedings under this Constitution; that after such publication the electors should be appointed, and the senators and representatives elected; that the electors should meet on the day fixed for the election of the President, and should transmit their votes, certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled; that the senators and representatives shall convene at the time and place assigned; that the Senate should appoint a president for the sole purpose of receiving, opening and counting the votes for President, and that after he shall be chosen the Congress, together with the president, should, without delay, proceed to execute this Constitution.”

§ 375. This resolution, which appears to have been adopted on the 17th of September, 1787, may be found in the Madison papers containing the debates upon the Confederation and the Federal Constitution, page 541, and also in the Journal of Congress, vol. 12, pages 163 and 164, of the original edition, and vol. 4, page 781, of the edition of 1823.

§ 376. The Continental Congress, at a session held September 12, 1788, adopted the following resolution:—



“*Resolved, etc.*, That the first Wednesday in January next be the day for appointing electors in the several States, which, before the said day, shall have ratified the said Constitution; that the first Wednesday in February next be the day for the electors to assemble in their several States and vote for a President; and that the first Wednesday in March next be the time, and the present seat of Congress the place, for commencing proceedings under the said Constitution.”

§ 377. The preamble to this resolution recites a portion of the resolution of September 17, 1787, but refers to it as having been passed on the 28th day of September, 1787. This last resolution may be found in the Journal of Congress, edition of 1823, vol. 4, page 866.

It thus appears that the Continental Congress, by the resolution of September 12, 1788, and acting under, and by virtue of, the authority conferred upon it by the resolution of the Constitutional Convention of September 17, 1787, declared that the first Wednesday in March, 1789, should be the time for commencing proceedings under the Constitution. The first Wednesday of March in that year fell on the fourth day of that month. The first paragraph of the second section of the first article of the Constitution provides that the House of Representatives shall be composed of members chosen every second year by the people of the several States. This implies necessarily that the term is for two years, and as the term of the members elected to the First Congress commenced on Wednesday, the 4th day of March, 1789, their term expired, by operation of the Constitution, on the 4th day of March, 1791; and, by a like necessity, the term of their successors commenced on the same day. As that provision of the Constitution has been operative without modification from that day to this, it has not been possible to make any change in the commencement or in the end of a Congress, or of the terms of members of the House of Representatives, or of the date of the term of the Presidential office.

§ 378. It thus appears that a term of Congress is as fixed as though specific provision had been made in the Constitution that it should commence on the fourth day of March and terminate on the fourth day of March at the end of every two years.

In like manner the Presidential term of office commences on the fourth day of March and must so continue until there shall be an amendment to the Constitution.

§ 379. Only one case has arisen under the fourth paragraph of section one of article two. In the case of Inglis against the Trustees of the Sailors' Snug Harbor (3 Pet. 99) the Court gave an opinion upon questions raised incidentally, touching the citizenship of Inglis, the demandant of a certain parcel of land situated in the city of New York. The decision can have no practical value inasmuch as the circumstances which gave rise to it are not likely again to be presented to the Court. Inglis, the demandant, was the son of a clergyman, who had been a resident of the city of New York for some years. The son was born about the 4th of July, 1776, and he remained with his father in the city of New York, inside the British lines, until the evacuation of the city, when he was taken by his father to England. The Court held that when Charles Inglis, the father, withdrew from New York to the British Dominions, he had the right to elect to become and remain a British subject; that the citizenship of the son was determined by the citizenship of the father, and that by the act of the father he became a subject of Great Britain, and consequently, under the laws of New York, he was incapable of inheriting land in that State.

## CHAPTER XXXIII.

### PARDONS.

#### ART. 2, SEC. 2, PAR. 1.

“The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer of each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.”

§ 380. The citations under this clause of the Constitution relate exclusively to pardons and the limitations upon the exercise of the power to pardon, as that power is granted to the President. Chief Justice Marshall, in the case of the United States against Wilson (7 Pet. 150), defined the pardoning power in these words, namely: “Pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private though official act of the executive magistrate delivered to the individual for whose benefit it is intended, and not communicated officially to the Court.” He then proceeds to say that the Court can take no notice of a pardon unless it is pleaded, and the evidence of its existence and its nature must be established by proofs. It must also appear whether the pardon has been accepted or rejected by the person to whom it was tendered.

§ 381. One William Wells having been convicted of murder in the District of Columbia and sentenced to be hung on the 23d of April, 1852, President Fillmore granted him a conditional pardon. The material part of the pardon was in these words, namely: “I have granted and do hereby

grant unto him, the said William Wells, a pardon of the offence of which he was convicted, upon condition that he be imprisoned during his natural life; that the sentence of death is hereby commuted to imprisonment for life in the penitentiary of Washington." Wells accepted the pardon in these words, "I hereby accept the above and within pardon with condition annexed." Subsequently the petitioner applied to the Circuit Court of the District of Columbia for a writ of *habeas corpus*, and upon the ground that the condition by which the sentence of death was commuted to imprisonment for life, was an unconstitutional exercise of the pardoning power and consequently void. Mr. Justice Wayne gave the opinion of the Court, in which there is an exhaustive review of the origin of the pardoning power, and instances of its exercise in Great Britain are cited. It was held that the words "reprieves" and "pardon" used in the Constitution were to be construed according to the practical definition that had been given to them in Great Britain. The conclusion reached by the Court was that by giving to those words their proper meaning, the power to pardon conditionally was not one of inference but one conferred in terms. "The mistake in the arguments," say the Court, "is in considering an incident of the power to pardon, the exercise of a new power instead of its being a part of the power to pardon."

§ 382. Justices Curtis and Campbell denied the jurisdiction of the Court over the Supreme Court of the District in the matter of *habeas corpus*, and Justice M'Lean dissented from the judgment of the Court on the construction given to the clause of the Constitution. He reached the conclusion that Wells was illegally detained, and that he should be discharged. (18 How. 307.)

§ 383. The more recent decisions of the Court in regard to the exercise of the pardoning power have related to parties who were implicated in the Rebellion. The case of *Ex parte Garland* (4 Wall. 333) has been already considered

under the clause in regard to the enactment of *ex post facto* laws. In the case of Garland, the Court said, "the power of the President was unlimited except in cases of impeachment; that it extended to every offence known to the law, and might be exercised at any time after its commission, either before legal proceedings are taken or during their pendency or after conviction and judgment." And finally, that in its exercise, the President was not subject to legislative control. When granted after conviction, all faults and disabilities were removed, and the party was restored to all his civil rights. If, however, property or interests had been vested in others, in consequence of the conviction and judgment, or offices had been forfeited by conviction, the pardon did not work a restoration of office, property or interest.

§ 384. The property of one Armstrong having been seized under the act of Congress of August 6, 1861, entitled an act "to confiscate property, used for insurrectionary purposes," and said Armstrong having received full pardon and amnesty by the President, subsequent to the seizure, the question arose whether he was relieved from the penalty so far as the claim of the United States was concerned. In that case the property seized was a foundry which had been used by the Confederacy in the manufacture of war material. It was insisted in the argument that the confiscation was void absolutely, inasmuch as it was directed against the use of the property, rather than against the owner. The Court did not concur in that view, but said that it was clear that the statute regarded the consent of the owner to the employment of his property in aid of the Rebellion as an offence, and that forfeiture was inflicted as a penalty. "The general pardon of Armstrong relieved him of so much of the penalty as accrued to the United States." (6 Wall. 766.)

§ 385. In the case of the United States against Padelford (9 Wall. 531), the Court held that the government, having

seized the defendant's cotton, sold the same, and placed the proceeds in the Treasury, the government had become a trustee, and that upon the restoration of Padelford to his civil rights by the pardon of the President, he was entitled to the net proceeds precisely as he would have been had he been a loyal owner of the cotton so captured.

§ 386. A more important opinion was rendered in the case of the United States against Klein (13 Wall. 128). Subsequent to the decision in the Armstrong case, Congress passed an act, approved July 12, 1870 (16 Stat. 235), denying to the Court of Claims the ability to consider any pardon or amnesty granted by the President, and declaring that proof of loyalty in all cases should "be made irrespective of any executive proclamation, pardon or amnesty or other act of condonation or oblivion." Chief Justice Chase, in the opinion of the Court, reaffirmed the doctrine announced in the Padelford case, that the government had constituted itself a trustee, not only for those who were entitled to the proceeds of captured and abandoned property by virtue of their loyalty, but also for such as had been disloyal, but who were afterwards restored to citizenship by the clemency of the President. The Court reaffirmed the doctrine that each of the coördinate departments of the government, the Legislative, the Executive, and the Judicial, were independent each of the other; that the power to pardon is exclusively in the Executive, and that Congress has no legal capacity to do any act or thing which may affect the scope of the pardoning power, or impair the authority of the President in its exercise. The Court say: "It is clear that the Legislature cannot change the effect of such pardon, any more than the Executive can change a law, yet this is attempted by the provision under consideration. The Court is required to receive special pardons as evidence of guilt, and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This

certainly impairs Executive authority and directs the Court to be instrumental to that end.”

§ 387. A general pardon and amnesty does not entitle the recipient to the proceeds of his property previously condemned and sold under the confiscation act, after such proceeds have been paid into the Treasury of the United States. In such cases the proceeds have become vested in the United States and the pardon is therefore inoperative to divest the government of the property. (Knote against the United States, 95 U. S. 149.)

## CHAPTER XXXIV.

### TREATIES.

#### ART. 2, SEC. 2, PAR. 2.

“He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.”

§ 388. The cases that have been decided under this clause of the Constitution relate in the main to the construction and interpretation of treaties. The first important case reported is that of the Cherokee Nation against the State of Georgia (5 Pet. 1). The question was raised at the hearing whether an Indian tribe known as the Cherokee Nation was such a sovereign and independent State that it could maintain a suit against the State of Georgia. The Cherokee Nation by proper authorities filed a bill in the Supreme Court and moved for a subpœna to the State of Georgia, and also for a temporary injunction to restrain the State from enforcing certain laws within the territory alleged to belong to the complainants. In the course of the opinion given by Chief Justice Marshall, by which the motion for an injunction was denied, it was said, “That an Indian Tribe or Nation within the United States is not a foreign state in the sense of the Constitution, and cannot maintain an action in the Courts of the United States.” The opinion contains the suggestion that the attempted exercise of jurisdiction by the State of Georgia over the territory and people of the



Cherokee Nation was an unconstitutional exercise of power, but that the question of right was not properly before the Court. Again the Court say that the issuance of a writ of injunction would savor "too much of the exercise of political power to be within the proper province of the Judiciary Department." Finally, as a reason for not passing definitively upon the points that had been raised at the bar, the Court say that the vital point in respect to parties made it unnecessary to decide the question of power on the part of the judiciary.

§ 389. The question of the validity of the statutes passed by the State of Georgia was further and more fully considered in the case of *Worcester against the State of Georgia* (6 Pet. 515). The statute of the State of Georgia, passed in the year 1830, asserted authority over the territory and the members of the tribe of Indians known as the Cherokee Nation. The provision of the statute which was especially considered was in these words: "And be it further enacted by the authority aforesaid, that all white persons residing within the limits of the Cherokee Nation, on the first day of March next or at any time thereafter without a license or permit from his Excellency the Governor, or from such agent as his Excellency the Governor shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and upon conviction thereof shall be punished by imprisonment at hard labor at the penitentiary for a term of not less than four years."

There were some exceptions named as to the scope of this provision, but none of them related to the plaintiff in error. Worcester was a clergyman and an authorized missionary of the American Board of Commissioners for Foreign Missions, who had received authority from the President of the United States to visit the Cherokee Nation, to reside among them for the purpose of instructing them, and converting them to the Christian religion. He was arrested

and charged with having violated the statute quoted, was convicted and sentenced to imprisonment in the penitentiary for a term of four years.

§ 390. In his plea in the State Court, he set forth the fact that he had received authority from the President, that it had not been countermanded, that by the several treaties entered into between the United States and the Cherokee Nation of Indians, the United States had acknowledged the said Cherokee Nation to be a sovereign nation, and that all persons who had settled within their territory were free from legislative interference, by any of the several States composing the United States of America, with reference to acts done within the territory of the Cherokee Nation.

§ 391. That plea was overruled by the State Court. In the opinion given by Chief Justice Marshall, he reviewed the history of the American Indians, and the relations of the Colonies and of the Confederation to the various tribes that occupied the country at the time of its discovery. The Chief Justice said finally: "The whole intercourse between the United States and this Nation is by our Constitution and laws vested in the government of the United States. The Cherokee Nation is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of Congress. The act of the State of Georgia under which the plaintiff in error was prosecuted is consequently void, and the judgment a nullity." . . . "It is the opinion of this Court that the judgment of the Superior Court of the county of Gwinnett in the State of Georgia condemning Samuel A. Worcester to hard labor in the penitentiary of the State of Georgia for four years, was pronounced by that Court under color of a law which is void as being repugnant to the Constitution, treaties and laws of the United States, and ought therefore to be reversed and annulled."

§ 392. This decision does not in any respect contravene the decision in the case of the Cherokee Nation against the State of Georgia; it does not proceed upon the idea that the Cherokee Nation was a sovereignty in the sense that Great Britain is a sovereignty; but that by the treaties which had been made with the Nation, the government of the United States had recognized the existence of certain rights of jurisdiction over the territory, and of self-government in the members of the Nation, which the government of the United States was bound to protect, and in reference to which the States composing the Union, were destitute as States of any authority whatsoever. What has since been stated with formality, that the Indian tribes and nations are wards of the United States, was the basis on which this decision rested.

§ 393. In the year 1777 the State of Virginia passed a law authorizing and directing the sequestration of British property, and debts due from citizens of that State to the subjects of Great Britain. By the fourth article of the treaty of peace of September, 1783, it was agreed, "that creditors on either side shall meet with no lawful impediment to recovery of the full value in sterling money of all *bona fide* debts heretofore contracted." In the year 1780, one Hylton, the defendant in error in the case of Ware against Hylton (3 Dal. 199), paid into the loan office of Virginia a sum of money, being an amount due to Ware, a subject of Great Britain.

§ 394. Upon suit being brought by Ware against Hylton, the defendant pleaded the law of the State of Virginia, and the payment of so much of the plaintiff's debt as he had paid to the State of Virginia. The plaintiff to avoid this bar replied by citing the fourth article of the treaty of peace between Great Britain and the United States. To this replication there was a general demurrer and joinder. The Circuit Court of Virginia sustained the demurrer, and the case was brought by a writ of error to the Supreme Court.

§ 395. The opinion of the Court by Justice Chase con-

tains a full history of the proceedings and a minute analysis of the fourth article of the treaty. The conclusion of the opinion is in these words, namely: "I am satisfied that the words in their natural import and common use give a recovery to the British creditor from his original debtor, of a debt contracted before the treaty, notwithstanding the payment thereof into the public treasury or loan office under the authority of any State law; and further I am of opinion that the judgment of the Circuit Court ought to be reversed, and that judgment ought to be given on demurrer for the plaintiff in error."

§ 396. This opinion is a broad assertion of the supremacy of the national government, and of its power by treaty, to compel citizens of a State to perform the obligation of a contract, although that contract had been annulled by the exercise of sovereign power in the State, when the State itself was not in any respect subordinate to the national government in the matter of the performance of contract obligations.

§ 397. The obligations imposed by a treaty upon the different branches of our government under our Constitution are considered in the case of *Foster against Neilson* (2 Pet. 253). By the eighth article of the Treaty of 1819 with Spain, it was stipulated, "That all grants of land made before the twenty-fourth day of January, 1818, by his Catholic Majesty or by his lawful authorities in the said territory ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands to the same extent, that the same grants would be valid if the territory had remained under the dominion of his Catholic Majesty."

§ 398. The Court was called to consider the question whether this stipulation could be made effective by the Court, and it was held that the treaty addressed itself to the political and not to the Judiciary Department, and that the Legislature must provide for the execution of the contract before it could become a rule for the Court.

§ 399. A distinction was recognized between the provision of a treaty which is so framed as to operate directly upon the citizens of the country, and a provision which was merely a stipulation that certain things should be done. As to the latter, legislation by Congress was necessary to enable the Court to act.

§ 400. In the further consideration of private rights under a treaty in the case of the City of New Orleans against Armas and Cucullu (9 Pet. 223), it was decided that the stipulation in the treaty for the cession of Louisiana which guaranteed protection to the inhabitants and their property, ceased to be operative when the State of Louisiana was admitted into the Union.

§ 401. The third article of the treaty is expressed in these words, namely: "The inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion they profess." The Court held that the latter provision was operative only while the territorial condition continued, and that upon the admission of the territory into the Union as a State, the guarantee in reference to the stipulation in the treaty as to the free enjoyment of liberty, property and religion was no longer in force.

§ 402. The doctrine laid down in the case of Foster against Neilson was enforced by the Court in the case of Baldwin against Franks (120 U. S. 678). Baldwin, the plaintiff in error, asked for a review of the judgment of the Circuit Court for the District of California, that had refused his discharge on a writ of *habeas corpus*, from the custody of the marshal, by whom he was held under a warrant issued by the commissioner of the Circuit Court upon the charge of conspiracy, with certain others, to deprive Sing Lee and

others belonging to the class of Chinese aliens, being subjects of the Emperor of China, of the equal protection of the laws, privileges and immunities of the United States.

§ 403. By the second and third articles of a treaty between the United States and the Emperor of China, concluded November 17, 1880, it was agreed in substance that the Chinese subjects of certain specified classes who were then in the United States, should be "allowed to go and come of their own free will and accord, and be accorded all the rights, privileges, immunities and exemptions which are accorded to citizens and subjects of the most favored nation."

§ 404. There was also a further stipulation that if laborers of any other class than those enumerated, then residing in the territory of the United States, should "meet with ill treatment at the hands of any other persons, the government of the United States will exert all its power to devise measures for their protection, and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens and subjects of the most favored nation, to which they are entitled by treaty."

§ 405. The Court held that these stipulations did not act of their own vigor, as parts of the treaty, and that in their nature they could not be observed and enforced by the Court unless Congress provided by law for their execution.

§ 406. Attention was called to three sections of the Revised Statutes (5336, 5508 and 5519). The Court found that those sections did not relate to aliens, and that of course they were inapplicable to Sing Lee and others, his associates, who were Chinese aliens. The word "citizen," as used in the statutes cited, was limited to citizens of the United States, and of the respective States as defined and guaranteed by the fourteenth amendment of the Constitution of the United States.

§ 407. The Court recognized the authority of Congress to pass laws by which alien Chinese of the class referred to in the treaty would have been protected against interference,

but as Congress had neglected to act in the premises, the Court was unable to furnish the protection contemplated by the treaty.

§ 408. Other questions were raised in the case known as "The Chinese Exclusion Case" (130 U. S. 581). Subsequent to the decision in the case of Baldwin against Franks, Congress passed an act by which Chinese laborers were excluded from the United States. It was contended at the bar that inasmuch as the act of exclusion was contrary to the terms of the treaty, the law was therefore unconstitutional. The Court held, however, that the laws of the United States and treaties were alike the supreme law of the land, but that in all cases the last expression of the sovereign will must control. Mr. Justice Field, in the opinion which he gave, cited the act of Congress of July 7, 1798, by which the stipulations of the treaties theretofore concluded with France were abrogated.

§ 409. From these two cases, these propositions of Constitutional law may be deduced:—

1. Where the provisions of a treaty secure specific rights to individuals, those rights can be enforced by the Courts without the aid of the Legislative branch of the government.

2. Where a treaty contains a declaration that immunities and privileges shall be secured to aliens, the means of securing such privileges and immunities must be provided by the Legislative branch of the government, or otherwise the Courts are powerless to act in the premises.

3. That the power of the Legislative Department to exclude aliens, for example, from the United States is an incident of sovereignty which cannot be surrendered by the treaty-making power.

4. That the Legislative Department of the government may annul a treaty by a legislative act.

§ 410. Several cases of importance have been considered and adjudged by the Supreme Court which had their origin in the legislation of Congress designed, first, to limit the

migration of Chinese into the United States, and then, secondly, to secure the deportation of those persons of Chinese origin and birth who might not comply with the requirements of a statute enacted in 1892, and entitled, "An act to prohibit the coming of Chinese into the United States." (27 Stat. L. 25.)

The important cases are these, viz.:—

*Chy Lung v. Freeman*, 92 U. S. 275.

*Chew Heong v. The United States*, 112 U. S. 536.

*Yick Wo v. Hopkins*, 118 U. S. 356.

*United States v. Jung Ah Lung*, 124 U. S. 621.

*Chae.Chan Ping v. The United States*, 130 U. S. 581.

*Nishimura Ekiu v. The United States*, 142 U. S. 651.

*Fong Yue Ting v. The United States*, 149 U. S. 698.

The views of the Court are so fully set forth in the opinion rendered in the case last named that a critical examination of the preceding cases is unnecessary.

In the case of *Chy Lung*, the Court held that a law of California which exacted a bond or commutation in money as a condition precedent to the landing of classes of persons enumerated, among which was a class termed "lewd and debauched women," was in derogation of the power of Congress to regulate commerce with foreign nations.

The case of *Yick Wo* is treated under the fourteenth amendment.

§ 411. The main point considered in the case of *Chae Chan Ping* was the power of Congress to abrogate a treaty. The existence of the power was recognized and affirmed.

In the case of *Nishimura*, the Court held that the statute of March 3, 1891, which forbade the landing of certain classes of immigrant passengers, was constitutional and valid.

The opinion in the case of *Fong Yue Ting*, from the pen of Mr. Justice Gray, is a review of the preceding cases in which the powers of Congress have been considered by the Supreme Court.



The decisions rendered in those cases seem to be final as to the existence of the powers following, viz. :—

1. Congress has power to abrogate a treaty. The treaty-making power is vested in the President and the Senate, and with the consent of the other contracting party it is competent for the President and Senate to annul an existing treaty; but the power to abrogate a treaty is vested in Congress alone.

2. Congress has power to exclude aliens from the territory of the United States, and the exercise of that power may be vested in executive officers. Aliens, not residents, are not "persons" in the language of the Constitution, and therefore the phrase "due process of law" is not applicable to them.

"It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."

§ 412. The statute of 1892 gave rise to a question of more importance, viz. : Can the Congress of the United States declare by statute that aliens who are upon the territory in conformity to existing laws may be sent from the country as is provided in that statute? By that statute, all Chinese laborers who were in the country at the time of the passage of the act were required to obtain a certificate of that fact from the collector of internal revenue, and in default of such certificate at the end of a year from the passage of the act, the delinquent was to be taken before a judge of a United States Court, and in default of the ability to explain, as required in the statute, his failure to procure the certificate, it is made the duty of the judge to decree the deportation of the laborer.

On this point the Court said: "The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the govern-

ment, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the Judicial Department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene." . . .

"The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power."

Under this power the Court said that it was competent for Congress to direct that any Chinese laborer found in the United States without a certificate of residence might be removed out of the country by executive officers without judicial trial or examination, as it might have authorized such officers to have prevented his entrance into the country.

This statement was not required by the issues raised on the statute, and upon the important question whether under that statute the removal contemplated was by due process of law, the Court said: "When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power, for here are all the elements of a civil case, — a complainant, a defendant and a judge, — *actor, reus et judex*."

Thus, the power of Congress to provide for the exclusion of aliens from the territory of the United States, and to provide for the deportation of such as may be within the jurisdiction of the United States, is an unlimited power.

A treaty is the supreme law of the land, which the Courts are bound to take notice of and to enforce, in any appropriate proceeding, the rights of parties growing out of the treaty. (United States v. Rauscher, 119 U. S., 407.)

## CHAPTER XXXV.

### DUTIES OF THE PRESIDENT.

#### ART. 2, SEC. 3.

“He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.”

§ 413. The third section of article two of the Constitution imposed upon the President, among other duties, the duty of commissioning all the officers of the United States. In the important case of *Marbury against Madison* (1 Cr. 137) the Court was called to consider the duty of the President and of the Secretary of State, under the Constitution and laws, in regard to the preparation and delivery of commissions.

§ 414. At the close of the administration of John Adams, a commission for Mr. Marbury as Justice of the Peace for the District of Columbia was prepared and signed by the President, and placed in the hands of the Secretary of State; but it had not been delivered to Mr. Marbury. When Mr. Jefferson became President, and Mr. Madison became Secretary of the Department of State, the commission which had been so prepared was retained in the department. Mr. Marbury and his associates, who had also been appointed to the same office, and in like manner, through their attorney entered a motion in the Supreme Court for a rule to James Madison, Secretary of State of the United States, to show cause why a *mandamus* should not issue commanding him

to cause to be delivered to them respectively their several commissions as Justice of the Peace for the District of Columbia.

§ 415. The motion was denied upon the ground that under the Constitution, the Supreme Court had not original jurisdiction to issue a writ of *mandamus* to an officer of the United States, and that it was only by the exercise of appellate jurisdiction that a *mandamus* could be issued.

§ 416. From the opinion of the Court, delivered by Chief Justice Marshall, the following conclusions may be drawn, and in accordance with which subsequent applications for the writ of *mandamus* have been adjudicated.

§ 417. 1. When a nomination has been made to the Senate, and the advice and consent of the Senate has been given, and the commission prepared, signed by the President and placed in the hands of the Secretary of State, it becomes the duty of the Secretary of State under the Constitution and laws to affix the great seal of the United States, and deliver the commission to the appointee.

§ 418. 2. That in the case then at bar, Marbury and his associates were entitled under the Constitution and laws, to the evidence which the commissions would furnish, of their appointments respectively to the office of Justice of the Peace for the District of Columbia.

§ 419. 3. That a remedy existed through a process of a writ of *mandamus* had the application been made to a Court having jurisdiction of the case.

§ 420. 4. That the writ of *mandamus* will not lie, except in cases where the officer to whom it is directed is without discretion in the exercise of the duty imposed upon him, and to which the application relates.

§ 421. Subsequently the Court held that the Circuit Court of the District of Columbia had jurisdiction to issue a writ of *mandamus* to the Postmaster-General, compelling him to do a merely ministerial act to which the relator had a complete right under an act of Congress, and as to which the

Postmaster-General had no discretion (*Kendall v. United States*, 12 Pet. 524).

§ 422. The Courts of the United States cannot issue a writ of *mandamus* to compel the governor of a State to perform a duty as such officer. (*Commonwealth of Kentucky v. Dennison, Governor*, 24 How. 66.)

§ 423. In the year 1866, a motion was made in behalf of the State of Mississippi for leave to file a bill in the name of the State, praying the Court to enjoin and restrain Andrew Johnson and E. O. C. Ord, general, commanding in the district of Mississippi and Arkansas, from executing, or in any manner carrying out, certain acts of Congress known as the "Reconstruction Acts."

§ 424. It was alleged as a reason for the issuance of the injunction that the acts of Congress were unconstitutional. Without inquiry into the constitutionality of the acts, the Court by the Chief Justice said: "We are fully satisfied that this Court has no jurisdiction of a bill, to enjoin the President in the performance of his official duties, and that no such bill ought to be received by us." The motion for leave to file the bill was therefore denied.

§ 425. The opinion contains a single reservation in these words: "The Court declines to express any opinion on the broader issues discussed in argument, whether in any case the President of the United States may be required by a process of the Court to perform a purely ministerial act under a positive law, or may be held amenable in any case otherwise than by impeachment for crime." (*State of Mississippi against Johnson*, 4 Wall. 475.)

§ 426. The power of the Circuit Courts of the United States to issue the writ of *mandamus* is limited to those cases in which it may be necessary to the exercise of the jurisdiction of such Courts. This was adjudged to be the law in the case of *M'Intire against Wood* (7 Cr. 504). In that case a motion was made in the Circuit Court of Ohio for a writ of *mandamus* to the Register of the Land Office at

Marietta, commanding him to grant final certificates of purchase to the plaintiff, for lands to which he supposed himself entitled under the laws of the United States. The case came to the Supreme Court upon the statement that the Circuit Court was divided. This case was tried as early as the year 1813, and there appears to be no remedy through subsequent legislation for what may be regarded as an omitted case in the statutes of the United States.

## CHAPTER XXXVI.

### IMPEACHMENT.

#### ART. 2, SEC. 4.

“The President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.”

§ 427. The fourth section of article two, which relates to impeachment, has never been called in question before the Supreme Court. In the case of the impeachment of Andrew Johnson, several of the articles preferred, charged acts which were neither high crimes nor misdemeanors by statute nor by common law. The eleventh specification, which was of that character, was sustained by the vote of thirty-five senators, who voted guilty, against the vote of nineteen senators who voted not guilty. As far as the action of the House and Senate can be treated as an authoritative interpretation of this provision of the Constitution, the President, Vice-President and all civil officers of the United States may be removed from office on impeachment for acts, which are neither high crimes nor misdemeanors by common law or the statutes of the United States.

## CHAPTER XXXVII.

### JUDICIAL POWER.

#### ART. 3, SEC. 1.

“The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuation in office.”

§ 428. The question arose very early whether the Circuit Courts could be required by an act of Congress to perform services not judicial in their nature. The first case considered by the Supreme Court is known as Hayburn's case (2 Dal. 409). There was a motion for a writ of *mandamus* to be directed to the Circuit Court for the district of Pennsylvania, commanding that Court to proceed in the case of a certain petition of William Hayburn, who had applied to be put on the pension list of the United States as an invalid pensioner.

§ 429. An act of Congress (1 Stat. 243) had authorized the Circuit Court upon evidence to be furnished by applicants, to place upon the pension rolls such officers, soldiers and seamen as they might find to be disabled and entitled to receive a pension under the statute. The Circuit Court of Pennsylvania, after a hearing, declined to proceed as requested in Hayburn's petition, and upon the ground that the duty was not judicial, and that by the Constitution the Court could not be required to perform other than judicial duties. The case was held under advisement by the Supreme Court, and a decision was not rendered by that tribunal, as Congress repealed the act at its next session. The conclu-



sion reached by the Circuit Court of Pennsylvania has been since accepted as a decision in conformity with the requirements of the Constitution.

§ 430. It was decided in the case of *Stuart against Laird* (1 Cr. 299), that under this clause of the Constitution Congress had power to establish inferior judicial tribunals in its discretion, and to authorize the transfer of pending proceedings from one inferior judicial tribunal to another.

§ 431. The proceedings of a military commission ordered by a general officer of the United States Army, commanding a military department, cannot be reviewed by the Supreme Court of the United States, inasmuch as the writ of *certiorari* cannot issue to a military commission. (*Ex parte Vallandigham*, 1 Wall., 243.)

## CHAPTER XXXVIII.

### JUDICIAL POWER. — ITS EXTENT.

#### ART. 3, SEC. 2, PAR. 1.

“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ; — to all cases affecting ambassadors, other public ministers and consuls ; — to all cases of admiralty and maritime jurisdiction ; — to controversies to which the United States shall be a party ; — to controversies between two or more States ; — between a State and citizens of another State ; — between citizens of different States ; — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects.”

§ 432. One of the early cases which arose under the second section of the third article of the Constitution rested upon that feature of the section which extended the judicial power to cases “between a State and citizens of another State.” One Chisholm, as executor, brought an action of assumpsit against the State of Georgia (2 Dal. 419). The question gave rise to extended argument in the Court, and the decision gave rise to much excitement in the country and great apprehensions in the States. The Court held that under that provision of the Constitution the action could be maintained.

§ 433. The State of Georgia neither answered nor appeared, and at the conclusion of the opinion an order was made that the plaintiff should file his declaration on a certain day, that a certified copy of his declaration should be served on the governor and the attorney general of the State of Georgia within a time fixed, and further, that unless the said State should either in due form appear, or show cause to the contrary by the first day of the then next term, judgment by default should be entered against the State.

§ 434. In the month of February, 1794, judgment was rendered for Chisholm and a writ of inquiry was ordered. The writ, however, was not sued out, and all further proceedings appear to have been delayed by mutual consent, and in the month of June, 1798, the President of the United States in a message to Congress announced the ratification of the eleventh article of the amendment to the Constitution.

§ 435. By that article citizens of other States were inhibited from commencing or prosecuting suits against one of the United States. As a consequence the suit of Chisholm and other suits that were then pending in the Courts of the country were dismissed from the records of the Courts.

§ 436. In the year 1798, the case of Hollingsworth against the State of Virginia was argued (3 Dal. 378). On the day succeeding the argument, the Court delivered a unanimous opinion that the Eleventh Amendment having been adopted, the Court was without jurisdiction in any case, past or future, in which a State was sued by the citizens of another State or by citizens or subjects of any foreign state.

§ 437. The fact that a State may be interested in a suit to which the State is not a party of record does not require the dismissal of the suit under the Eleventh Amendment of the Constitution. (*Osborn v. The United States Bank*, 9 Wh. 738.)

§ 438. Quite recently, in the case of *Hans* against Louisiana (134 U. S. 1), the Court questioned the soundness of the opinion in the case of *Chisholm* and the State of Georgia. The suggestion is made that the clause of the Constitution which gave jurisdiction in cases "between a State and citizens of another State," should have been limited to cases that were theretofore cognizable in the Courts of a State, or to suits by a State against a citizen or citizens of another State.

§ 439. Under this clause of the Constitution, the question was raised whether the Supreme Court had jurisdiction by

writ of error to the Circuit Court of the District of Columbia in a criminal case. It was held that the phrase, "The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority," did not justify the jurisdiction demanded. As the laws of the District of Columbia limited the jurisdiction of the Court by language which seemed appropriate only to civil cases, the Court was without jurisdiction in cases of crime. (*United States v. Benjamin More*, 3 Cr. 159.)

§ 440. In two cases it was held that a corporation aggregate could sue in the Courts of the United States if the members of a corporation were citizens of a State other than that in which the defendant resided. This, not upon the ground that the corporation itself was a citizen, but upon the ground that the members of the corporation being citizens of the State in which the corporation was situated, had through the agency of the corporation, and by virtue of their quality as citizens, a right of action in the Courts of the United States against citizens of another State. (*Hope Insurance Company v. Beardman et al.*; and the *Bank of the United States v. Deveaux*, 5 Cr. 57 and 61.)

§ 441. A corporation chartered by and having its place of business in a particular State may be sued in the Courts of the United States by a citizen of another State, although some of the stockholders in the corporation may be citizens of the same State with the plaintiff. (*5 Louisville Railroad Co. v. Letson*, 2 How. 497.)

§ 442. The citizenship of a corporation in the State where chartered is recognized in the case of *Railway Co. v. Whitton* (13 Wall. 270).

§ 443. It has also been held that where a plaintiff is a nominal plaintiff only, and the action is for the benefit of an alien, the nominal plaintiff may maintain a suit against the defendant, although a resident of the same State with the nominal plaintiff. (*Browne v. Strode*, 5 Cr. 303.)

§ 444. In the case of *Durousseau* against the United States (6 Cr. 307), it was held that appellate jurisdiction might be derived directly from the Constitution if the Court could ascertain from the Constitution an intent to allow appellate jurisdiction to be taken, and that even though there had been no affirmative legislation on the subject.

§ 445. As early as the year 1812, the Court decided that there was no common law jurisdiction granted in the Circuit Courts.

The case at bar was a case of libel, but the Court said: "The only question which this case presents is whether the Circuit Court of the United States can exercise a common law jurisdiction in criminal cases." . . . "In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition."

§ 446. "The course of reasoning which leads to this conclusion is simple, obvious and admits of but little illustration. The powers of the general government are made up of concessions from the several States. Whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions,—that power is to be exercised by Courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union." . . . "The legislative authority of the Union must first make an act a crime, affix a punishment to it and declare the Court that shall have jurisdiction of the offence." (*United States v. Hudson*, 7 Cr. 32.)

§ 447. The clause in this section which confers upon the Court power in "all cases of admiralty and maritime jurisdiction," does not make a cession of territory nor a grant of jurisdiction so as to vest in the United States the shores of the sea below low-water mark. (*United States v. Bevans*, 3 Wh. 336.)

§ 448. The question before the Court arose from these

facts. A person was charged with the crime of murder committed upon a ship of war of the United States lying in the harbor of Boston and within the jurisdiction of the State of Massachusetts. As there was no law of the United States giving jurisdiction of the case to any Court of the United States, it was held that jurisdiction could not be derived from the clause of the Constitution relating to "admiralty and maritime jurisdiction."

§ 449. An indictment having been found against a person not an ambassador, other public minister or consul for the offence of offering violence to the person of a public minister, the Court held that the case was not a case of which judicial notice could be taken under the clause of the Constitution in regard to ministers, but a case which affected in a legal point of view the United States and the accused only. (*The United States v. Ortega*, 11 Wh. 467.)

§ 450. The provision in relation to the diplomatic and consular representatives is to be so construed as to exclude all jurisdiction over them by State authorities. The exemption is not a personal privilege, but the privilege of the sovereign or nation that the representative shall be amenable in the Courts of the United States only. (*Davis v. Packard*, 7 Pet. 276.)

§ 451. In the absence of legislation, conferring jurisdiction upon the Supreme Court in controversies between States, the Court took and exercised jurisdiction in the controversy of the State of New Jersey against the People of the State of New York. (5 Pet. 284.)

§ 452. A question as to the boundary line between two States is a controversy between States of which the Supreme Court has jurisdiction under the Constitution. (*The State of Rhode Island v. The State of Massachusetts*, 12 Pet. 657.)

§ 453. With the exception of the decision and opinion in the *Dred Scott* case, the decision in the case of *Prigg* against the State of Pennsylvania (16 Pet. 539) excited the most

general and intense interest in the country, and especially in the then free States.

§ 454. In the year 1826, the State of Pennsylvania passed a statute by which it was made a penal offence for any person to take any negro or mulatto by violence or force, and with the design of reducing such negro or mulatto to slavery, or of detaining such negro or mulatto as a slave.

§ 455. A negro woman named Margaret Morgan, with her children, one of whom was born in the State of Pennsylvania, and all of whom were slaves, and the property of Margaret Ashmore of Maryland, was arrested as a fugitive from labor by a State constable and upon the complaint of Edward Prigg, the plaintiff in error and agent of Margaret Ashmore.

§ 456. The magistrate before whom the woman was brought declined to proceed to a final determination of the claim under the statute of 1793 in regard to the rendition of fugitives from labor, and thereupon Prigg carried the woman to Maryland by force, and without any process of law.

§ 457. For this act Prigg was indicted, tried and found guilty. By writ of error, the case was carried to the Supreme Court of the State, and from that Court to the Supreme Court of the United States.

By a unanimous Court, an opinion was given by Justice Story that the statute of Pennsylvania was in conflict with the Constitution of the United States, and, consequently, was void.

§ 458. Against the views of a minority, consisting of Chief Justice Taney and Associate Justices Wayne and Thompson, the court held that all legislative power was vested in Congress, exclusively.

The dissenting justices maintained the doctrine that in the absence of legislation by Congress the States might pass laws in aid of the rendition of fugitives from labor, but that they were powerless to do any act which should impair the right of the owner to secure the return of a fugitive.

§ 459. Against the opinion of Justice M'Lean, the Court held that Prigg had a right to reclaim the fugitive Morgan, without any process of law, it having been admitted in the pleadings that she was the slave of Ashmore. Justice Story says in the opinion: "The clause [of the Constitution] manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no State law or regulation can in any way qualify, regulate, control or restrain."

§ 460. As there was no law of the United States which compelled a claimant to submit the justice of his claim to any tribunal, he was in no peril for a seizure of an alleged fugitive unless upon investigation it should appear that his claim was groundless.

§ 461. Finally, the Court said: "The judgment of the Supreme Court of Pennsylvania, upon the special verdict found in the case, ought to have been that the said Edward Prigg was not guilty." Thereupon the judgment of the Supreme Court of Pennsylvania was reversed.

§ 462. The proceedings in this case are valuable in an historical view only, as the extinction of the institution of slavery ended controversy as to the freedom of the negro race.

§ 463. Equity powers granted by the Constitution cannot be limited nor restrained by State legislation. (*Payne v. Hook*, 7 Wall. 425.)

§ 464. The State of Wisconsin passed an act by which foreign fire insurance companies proposing to do business in that State, were required, among other things, to sign an agreement by which they promised not to remove suits for trial into the Courts of the United States.

The Supreme Court held that such an agreement was repugnant to the Constitution of the United States and, consequently, was illegal and void.

§ 465. Parties cannot by contract oust Courts of their jurisdiction, nor can the jurisdiction of the Courts of the



United States be limited by State laws. (*Insurance Co. v. Morse*, 20 Wall. 445.)

§ 466. In the case of *Doyle against the Continental Insurance Company* (94 U. S. 535), the Court recognized the right of a State to exclude a foreign corporation from the privilege of doing business in the State, unless the terms imposed by State laws were observed, even though the terms imposed were repugnant to the Constitution of the United States.

§ 467. In the case of *Barron against Burnside* (121 U. S. 186), the Court pronounced a statute of the State of Iowa unconstitutional and void which required every foreign corporation, as a condition precedent to the grant of a permit for the transaction of business, to stipulate that it would not remove suits into the Courts of the United States, and upon the ground that the permit was made dependent upon the surrender of a privilege secured by the Constitution and laws of the United States.

§ 468. In the case of *Waring against Clarke* (5 How. 441), the Court went so far only as to declare that the admiralty and maritime jurisdiction of the United States was coextensive with the ebb and flow of the tide in the Mississippi River, although the river itself, at the point where the collision occurred, which gave rise to the controversy, was within the body of a county.

§ 469. In the more comprehensive opinion given in the case of the *Propeller Genesee Chief* against *Fitzhugh* (12 How. 443), the Court declared that its admiralty and maritime jurisdiction extended to all the navigable waters of the United States without regard to the ebb and flow of the tide.

§ 470. In the case of *The Hine* against *Trevor* (4 Wall. 555), the admiralty jurisdiction of the Court was declared to embrace all waters used in aid of commerce.

§ 471. The soil between high and low water mark where the tide ebbs and flows is the property of the State. (*Smith v. State of Maryland*, 18 How. 71.)

§ 472. The final conclusions of the Court, as stated in the case of Insurance Company against Dunham (11 Wall. 1), are these: —

(1) That the maritime and admiralty jurisdiction of the United States is not controlled by the statutes of England nor by the usages or decisions of the Courts of England.

(2) By a long train of decisions, said Justice Bradley, it has been settled that the admiralty jurisdiction “extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether land-locked or open, salt or fresh, tide or no tide.”

§ 473. In the year 1873, a statute was passed which authorized and required the Attorney General to institute a suit in a Circuit Court of the United States against certain persons who were not named, but who, as was alleged, had been parties to or beneficiaries of certain improper arrangements by which the Union Pacific Railway Company had suffered great losses.

It was provided that the suit might be brought in the Circuit Court in any circuit, and that all the parties might be made defendants in one suit.

§ 474. It was contended in the Supreme Court, before which the case was brought from the Circuit Court for the District of Connecticut, that the defendants were entitled, respectively, to trial in the districts where they resided.

§ 475. This point was controlled by the opinion of the Court. The Court of Claims was cited, whose jurisdiction in all cases in which the government is the defendant is coextensive with the country, and this citation was followed by the statement that it was competent for Congress to give equally extensive jurisdiction in all cases in which the government might be plaintiff.

§ 476. “Whether parties shall be compelled to answer in a Court of the United States wherever they may be served, or shall only be bound to appear when found within the

district where the suit has been brought, is merely a matter of legislative discretion, which ought to be governed by considerations of convenience, expense, etc., but which, when exercised by Congress, is controlling on the Courts." (*United States v. Union Pacific R. R. Co.*, 98 U. S. 569.)

§ 477. The provision of the Constitution by which the judicial power of the Courts of the United States extends to all cases of law and equity arising under the Constitution, laws or treaties of the United States, includes criminal as well as civil proceedings, and the power vested in the Courts of the United States in regard to cases so arising is independent of the judiciary of the States. (*Tennessee v. Davis*, 100 U. S. 257.)

§ 478. The question whether Congress has the power to confer upon inferior Courts original jurisdiction in cases where original jurisdiction has been granted to the Supreme Court by the Constitution, has never been decided by the Supreme Court. In the case of *Ames against Kansas* (111 U. S. 449), this observation is made after some discussion of the question: "We are unwilling to say that the power to make the grant does not exist."

Of course the power, if it exist, could not be so exercised as to dispossess the Supreme Court of its constitutional jurisdiction.

§ 479. A suit having been brought by the United States against the State of Texas, under a statute enacted specially for the purpose of disposing of a controversy over the boundary between that State and the Territory of Oklahoma, the jurisdiction of the Supreme Court was controverted, and upon the ground that the Constitution was silent as to controversies between States and the United States.

§ 480. Said the counsel for Texas: "The parties with whom the separate States can have legal controversies cognizable in the Courts of the United States by reason of the parties thereto, are distinctly named, and all others are necessarily excluded."

§ 481. As controlling this point the Court said: "The States of the Union have agreed in the Constitution that the judicial power of the United States shall extend to all cases arising under the Constitution, laws and treaties of the United States, without regard to the character of parties, and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this Court may exercise original jurisdiction in all such cases in which a State shall be a party, without excluding those in which the United States shall be the opposite party."

§ 482. Out of this general declaration, the Court excepted suits against a State by its own citizens, or by citizens of other States, or by citizens or subjects of foreign States. (*United States v. Texas*, 143 U. S. 621.)

§ 483. Without considering other clauses of this section, the grant of jurisdiction in all "controversies to which the United States shall be a party," would seem to justify the conclusion reached by the Court.

## CHAPTER XXXIX.

### JURISDICTION OF THE SUPREME COURT, ORIGINAL AND APPELLATE.

#### ART. 3, SEC. 2, PAR. 2.

“In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.”

§ 484. Appellate jurisdiction can be exercised by the Supreme Court only in conformity to such regulations as Congress may establish. (*Wiscart v. Dauchy*, 3 Dal. 321; *Duronsseau v. The United States*, 6 Cr. 307; *Ex parte McCardle*, 7 Wall. 506.)

§ 485. Nor can counsel by agreement confer appellate jurisdiction upon the Supreme Court. That jurisdiction rests solely upon the Constitution and the acts of Congress. (*The Lucy*, 8 Wall. 307.)

§ 486. The original jurisdiction, as granted and defined in the Constitution, cannot be enlarged by legislation. (*Marbury v. Madison*, 1 Cr. 137.)

## CHAPTER XL.

### TRIAL BY JURY.

#### ART. 3, SEC. 2, PAR. 3.

“The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as Congress may by law have directed.”

§ 487. The important case of *Ex parte* Milligan (4 Wall. 2) was reviewed under the clause of the Constitution in regard to the privilege of the writ of *habeas corpus*, but questions were considered and decided by the Court which fall properly under the clause relating to the right of trial by jury.

§ 488. Milligan, who was a citizen of the United States and a resident and citizen of the State of Indiana, was arrested in October, 1864, by the order of the general commanding the District of Indiana, upon the charge of conspiracy set forth in the allegation of specific offences of disloyalty, such as inciting insurrection and giving aid and comfort to the enemy.

§ 489. He was tried by a military commission, found guilty, and sentenced to suffer death by hanging. The sentence was approved by the President.

§ 490. A petition was filed by Milligan for the benefit of the writ of *habeas corpus*. Through due course of proceedings the writ was granted, and upon the ground that Indiana being then within the jurisdiction of the United States, the war powers of the government were not applicable; that the Courts were open; that persons charged with crime were entitled to the right of trial by jury under this article of the Constitution, reinforced as it is by the fifth and sixth amend-

ments; that Congress had not authorized trials by military commission in the loyal States; and, in fine, that Congress had no power to dispense with jury trials in States where the Courts were open and where the laws could be judicially administered.

§ 491. On the last point there was a division of opinions in the Court. Chief Justice Chase and Justices Wayne, Swayne and Miller being of opinion that it was competent for Congress in time of war, to authorize military commanders to create commissions with authority to try and punish offenders against such rules and regulations as might by law be established agreeably to the fourteenth clause of section eight, article one, which gives to Congress power "to make rules for the government and regulation of the land and naval forces."

§ 492. The minority of the Court maintained two propositions, viz.:—

(1.) When the privilege of the writ of *habeas corpus* is suspended, the executive is authorized to arrest and to detain persons charged with, or suspected of, criminal acts.

(2.) There are or may be cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in States where the civil Courts are open, may be authorized by Congress.

§ 493. Concurring with the majority of the Court in the opinion that Congress had not authorized trials by military commissions in the States where the laws could be administered in the Courts of civil jurisdiction, they yet cite the condition of Indiana as an illustration of the possibility of the existence of a state of affairs which required the exercise of the powers for which the minority contended.

§ 494. They say of Indiana that a powerful secret organization existed, that there were military bodies conspiring against the draft, that there were schemes for insurrection and for the liberation of prisoners, for the seizure of arsenals, and even for war against the national government.

§ 495. Happily, they say, "the judges and officers of the Courts were loyal to the government." Had the judges and officers of the Courts been disloyal, had the legislature been hostile and the general public sentiment been in sympathy with the treasonable spirit of the organizations mentioned, the government would have been powerless, and the operations of the army would have been thwarted by the enemies of the Union.

§ 496. If it may be assumed that the power for which the minority contended would not be unwisely nor improvidently exercised, it follows that their view is most likely to conduce to the peace of society in times of supreme peril, and to the preservation of the Union, if again, unhappily, its integrity should be assailed from within.

§ 497. The right of trial by jury extends not only to felonies, but to classes of misdemeanors which involve the deprivation of liberty.

Persons charged with minor offences, such as violations of police regulations, are not entitled to a trial by jury under the provisions of the Constitution.

(*Callan v. Wilson*, 127 U. S. 540.)

§ 498. This guaranty of the right of trial by jury relates only to trials in the Courts of the United States, and it has no application to trials in State Courts.

(*Nashville &c. Railway v. Alabama*, 128 U. S. 96.)



## CHAPTER XLI.

### TREASON.

#### ART. 3, SEC. 3, PAR. 1.

“Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.”

§ 499. The gravity of the charge of treason is such that the Courts will require a strict observance of the laws of Congress in all the proceedings, as well those preliminary to the trial as to the proceedings of the trial. Hence, in the case of the United States against the Insurgents, the Court required special notice to the accused of the names, residence and occupation of the jurors who had been summoned and from whom the panel was to be selected.

§ 500. A list of the witnesses should be furnished also and a reasonable time allowed to the accused to obtain witnesses in his behalf after the delivery of such list.

(The United States *v.* The Insurgents, 2 Dal. 335.)

§ 501. An insurrection to prevent by force the execution of an act of Congress is levying war against the United States, and consequently treason.

Participation therein can only be proved by the testimony of two witnesses to the same overt act.

A conspiracy to engage in insurrection is not treason. (United States *v.* Mitchell, 2 Dal. 348.)

§ 502. If an army be actually raised for the purpose of carrying on war against the United States, then any person who, knowing that the army has been so raised, and for such unlawful purpose, contributes willingly to the organization, equipment or supply of the force, is guilty of treason.

§ 503. As to proof, it is held that until an overt act of treason has been proved by the testimony of two witnesses to the same act, minor evidence, such as letters, circulars, conferences or conspiracies, cannot be introduced.

(United States *v.* Aaron Burr, 4 Cr. 470 Appendix B.)

§ 504. The crime of treason cannot be extended by implication to crimes which have not ripened into the offence described in the Constitution. These lesser crimes are high misdemeanors which may be punished in the discretion of Congress.

§ 505. The men who framed the Constitution thought it more safe that punishment for the crime of treason "should be ordained by general laws formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation."

§ 506. To conspire to levy war and actually to levy war are distinct offences.

The conspiracy must have ripened into action by the assembling of men for the purpose of making war on the government, or the fact of levying war cannot have existed.

The magnitude of the force is not material. The crime consists in the assembling of a warlike body with the intent of making war on the United States, combined with some act designed to execute the intent.

§ 507. In such a case, all those who perform any part, however minute, or however remote from the scene of action, and who are leagued in the general conspiracy, are to be considered as guilty of treason.

(*Ex parte* Bollman and *Ex parte* Swartwont, 4 Cr. 75.)

## CHAPTER XLII.

### PUNISHMENT OF TREASON.

#### ART. 3, SEC. 3, PAR. 2.

“The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.”

§ 508. In the authenticated copies of the Constitution printed previous to 1864, a comma was inserted after the word “blood” and another after the word “forfeiture.” An examination of the original engrossed Constitution in the State Department led Mr. Seward, Secretary of State, to issue a certificate, which was read in the House of Representatives, and by which the error of the insertion of a comma after the word “forfeiture” was corrected.

§ 509. In the original report of the Constitution by the Committee of Detail, the clause reads thus: No attainder of treason shall work corruption of blood, *nor* forfeiture, except during the life of the person attainted. (Elliot’s Debates, v. 5, p. 379.)

By the action of the Convention, the word “nor” was changed to “or,” and the comma after the word “forfeiture” was omitted.

The reasons if any, assigned for the changes, do not appear in the report.

§ 510. It is apparent that the Convention dealt with the punctuation of the Constitution as an important aid to the expression of the meaning of the language employed.

Nor was it ever true that punctuation is no part of a statute. The popular and professional error seems to have had its origin in the circumstances as set forth in a note

prepared by the Hon. William A. Richardson, Chief Justice of the Court of Claims of the United States.<sup>1</sup>

<sup>1</sup> That "punctuation is no part of the law" is a common error frequently asserted by lawyers and occasionally found in judicial opinions. (*Cushing v. Warwick*, 9 Gray; *Hammock v. Loan & Trust Company*, 105 U. S. R. 84.)

This error is founded on the case of *Doe v. Martin* (4 Term Reports, p. 65) decided in 1790, "*Barrington's Observations on Statutes*," written in 1796, and other old English authorities.

In England this was a correct statement of *fact*, mistaken in this country for the enunciation of a *principle of law*.

Before 1849 acts of Parliament were engrossed on parchment, without punctuation. When published by the Queen's printer, punctuation marks were inserted according to the ideas of the editor. These marks, though "useful as a guide to a hasty enquirer," were never regarded in England as part of the law, because the law making power had never authorized them.

That practice was changed in 1849, since which time Bills pending in Parliament are put in print with punctuation and marginal notes. The types are kept standing and the text, marginal notes and punctuation are changed from time to time, as one House or the other makes amendments. When the Bills are passed finally, the Queen's printer has only to strike off copies of the acts as they stand in type and are approved by the Queen. Her approval is given by a Royal Commission, naming a large number of high officials, any three of whom are authorized to approve in her name the bills specifically mentioned. This is done in the presence of the two Houses. The Commons are called to the House of Lords where the Speaker and a few other members attend, and, with as many Peers as choose to attend, form the two Houses assembled for that purpose. The clerk of Parliament, by one of his subordinates, takes from the table and reads each bill by its title, and after the reading, the clerk of the Crown says to the commissioners present, usually five, interrogatively, "*la reine le veult?*" The commissioners all assent by nodding their heads, and the act is thus approved. Thereafter a subordinate clerk writes the same words at the beginning, and the clerk of Parliament alone signs the act.

In this country the punctuation of statutes does not have the same pronounced concurrence of the law making power as it now has in Great Britain. Bills in Congress and in the State legislatures are punctuated while pending there, and if it were certain that they were always engrossed as passed, the rolls would be conclusive of the legislative intent. But it is well known, from constantly recurring facts, that engrossing clerks make mistakes not only in punctuation, but even in words and paragraphs. With these mistakes the courts must deal as best they can. Congress, by direct enactment, has amended the punctuation of prior acts. (Act of 1877, Feb. 27, Ch. 69, Sec. 1; 1 Supplement to Revised Statutes, 1st ed. pp. 276, 277, 279, par's. 149, 154, 182, and 19 Stat. L. 240.) In the case of United States

§ 511. By a statute of July 17, 1862 (Stat. v. 12, p. 589), it was enacted that "the estate and property, money, stocks, credits and effects" of certain persons and classes of persons described, should be seized and confiscated, the proceeds thereof to be applied to the support of the army.

§ 512. President Lincoln declined to sign the bill although a formal veto was not made. His objection related to the confiscation of the real estate of the offender.

§ 513. Thereupon Congress passed an explanatory joint resolution, which was approved the same day. (Stat. v. 12, p. 627.) By that resolution it was provided that the act should be so construed as not to apply to any act or acts done prior to the passage thereof, nor to include any member of a State legislature, or judge of any State Court who had not, in accepting or entering upon his office, taken an oath to support the Constitution of the so-called Confederate States of America; nor should any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life.

§ 514. The objection raised by President Lincoln was accepted by Congress as valid, but at that time the error in the punctuation of the clause had not been discovered, nor was there any knowledge, probably, that the convention, by its careful attention to the punctuation, had made it, for the purposes of construction, a binding part of the instrument.

§ 515. Upon the words as now written, "or forfeiture except during the life of the person attainted," an argument

*v. Ambrose* (2 Fed. Reporter, 764) it was held that an indictment which would have been good under a previous act, was bad under a section of the Revised Statutes which embodied the same words differently punctuated.

Thus in this country the punctuation, like the words of an act, is part of the law; but both are to be read according to the obvious intention of the legislature deduced from the whole act considered together, and both may be changed to carry out that intent. (*Ewing v. Burnet*, 11 Peters, 41; *United States v. Ishm*, 17 Wall. 496; *Wilson et al. v. Spaulding*, 19 Fed. Reporter, 304, and numerous other decisions.)

may be based, that the proceedings for forfeiture were not to be postponed till after the death of the offender. For this restriction there is adequate reason. It would be an indefensible hardship and injustice to require heirs to defend a title to estates upon the ground that an ancestor had been guilty of a crime.

§ 516. It still remains true that, by the statute of 1862 and the explanatory joint resolution when considered together, the personal property of an offender was subject to forfeiture absolutely. This peculiarity may be due to the circumstance that a statute of confiscation could not take notice of any other right than an exclusive right of present property in choses in possession and choses in action, the use of which is not separable from the property itself.

§ 517. Hence there must have been provision for the confiscation of personal property, absolutely, or the confiscation of personal property in any form must have been abandoned.

§ 518. In the case of *Bigelow against Forrest* (9 Wall. 339), the Court declined to consider the powers of Congress under the clause of the Constitution relating to forfeitures for treason and limited their observations to the scope and effect of the statute and joint resolution of July 17, 1862. The Court, through Mr. Justice Strong, said, "the act and the resolution are to be construed together, and they admit of no doubt that all which could, under the law, become the property of the United States, or could be sold by virtue of a decree of condemnation and order of sale, was a right to the property seized, terminating with the life of the person for whose act it had been seized."

§ 519. At a later period, the Supreme Court of Louisiana having held that a sale of land made under the confiscation acts and in obedience to a decree which purported to authorize the conveyance of the entire estate, was invalid upon the death of the person against whom the decree was made, the Supreme Court of the United States affirmed the judgment,

and upon the ground "that a decree condemning the fee could have no greater effect than to subject the life estate to sale."

(*Day v. Micou*, 18 Wall. 156.)

§ 520. In a subsequent decision, the phraseology employed in the foregoing opinions was modified materially.

It was found that the doctrine of the creation of a life estate and its confiscation, to be followed by the legal result, that the offender, during his lifetime, might sell the remainder, was a doctrine which defeated the manifest object for which the confiscation acts were passed.

§ 521. At the opening of the Civil War, one Wallach was the owner of a parcel of real estate situated in the city of Washington. Wallach became a colonel in the Confederate Army, and his estate was seized and sold under the confiscation acts. In the year 1866, Wallach conveyed his interest in the estate by deed of warranty, in which his wife joined, to one Van Riswick, who had already a claim upon the premises through a deed of trust executed before the war.

§ 522. Upon the death of Wallach, which occurred in the year 1872, his heirs filed a bill in the Supreme Court of the District of Columbia, claiming an estate in the land and a right to redeem the same and to have the conveyance of their father to Van Riswick declared to be no bar to the redemption of the estate by them.

§ 523. In the opinion Mr. Justice Strong said, speaking of the statute, "its purpose, as well as its justification, was to strengthen the government and to enfeeble the public enemy by taking from the adherents of that enemy the power to use their property in aid of the hostile cause. With such a purpose, it is incredible that Congress, while providing for the confiscation of an enemy's land, intended to leave in that enemy a vested interest therein, which he might sell, and with the proceeds of which he might aid in carrying on the war against the government." . . .

§ 524. Again it is said, "without pursuing the subject further, we repeat that to hold that any estate or interest remained in Charles S. Wallach after the confiscation and sale of the land in controversy would defeat the avowed purpose of the Confiscation Act, and the only justification for its enactment."

§ 525. It was claimed at the bar by the counsel for Van Riswick that in the cases cited the Court had announced the doctrine that by the proceedings under the Confiscation Act, a life estate was carved out of the fee, leaving the latter vested where it was before the proceedings were instituted.

§ 526. To this position the Court replied thus: "What was seized, condemned as forfeited and sold, in the proceedings against Charles S. Wallach's estate, was not, therefore, technically, a life estate. It is true that some expressions were used indicating an opinion that what was sold under the Confiscation Acts was a life estate carved out of a fee. The language was, perhaps, incautiously used. We certainly did not intend to hold that there was anything left in the person whose estate had been confiscated. The question was not before us. We were not called upon to decide anything respecting the quantity of the estate carved out, and what we said upon the subject had reference solely to its duration."

§ 527. It appears to have been the doctrine of the Court that the fee of the land, which was in Wallach previous to the proceedings for confiscation, was taken from him by the act of Congress for a limited time, that is to say during his life, the reversion being for the benefit of his heirs at his death. Finally, the Court said: "We are not called upon to determine where the fee dwells during the continuance of the interest of a purchaser at a confiscation sale, whether in the United States or the purchaser, subject to be defeated by the death of the offender whose estate has been confiscated."

(Wallach *et al.* v. Van Riswick, 92 U. S. 202; Chaffraix v. Schiff, 92 U. S. 214.)



The doctrine thus set forth was changed, subsequently, in the case of the United States against Dunnington (146 U. S. p. 338). In that case the Court said: "Upon the whole, we think the doctrine was too broadly stated in *Wal-  
lach v. Van Riswick*," and the conclusion was reached "that the estate forfeited is the life estate of the offender, and that the fee remains in him, but without the power of alienating it during his life, unless the disability be removed."

## CHAPTER XLIII.

### PUBLIC RECORDS ; HOW PROVED.

#### ART. 4, SEC. 1.

“Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.”

§ 528. The cases that have been decided in the Supreme Court of the United States under this section of the Constitution have been brought there through attempts to enforce judgments rendered in one State by processes designed to enforce such judgments in other States.

§ 529. An early case is that of *Mills against Duryee* (7 Cr. 481). This case arose in an action of debt brought in the Courts of the District of Columbia on a judgment rendered in a Court of Record of the State of New York. The defendant had due notice of the suit in the State of New York, and judgment was rendered against him. He defended against the suit in the District of Columbia upon the plea that he was not indebted to the plaintiff. The Supreme Court of the District of Columbia held that the plea was bad, and that view was sustained by the majority of the Supreme Court of the United States.

§ 530. In order that full faith and credit be given to the proceedings of the Courts of New York, it was held to be necessary that the Courts of every other State, and of the District of Columbia as well, should recognize the validity of the proceedings in New York. That view, however, rested upon two conditions:—

§ 531. 1. That the Court of New York in which the

judgment was rendered had jurisdiction of the parties and of the case.

§ 532. 2. In the case of M'Elmoyle against Cohen (13 Pet. 312), the Court said that a judgment in one State had the force of a judgment in another under the Constitution of the United States, only so far as to preclude all inquiry into the merits of the subject matter of the judgment.

§ 533. When, however, a judgment is rendered in a State Court upon a published notice merely, and without personal service, such judgment is not entitled to any faith or credit out of the State in which it was rendered. (*D'Arcy v. Ketchum*, 11 How. 165.)

§ 534. The State of Mississippi enacted a statute in form following, namely: "No action shall be maintained or any judgment or decree rendered by any Court without this State, against any person who, at the time of the commencement of the action, in which such judgment or decree was or shall be rendered, was or shall be a resident of this State in any case where the cause of such action would have been barred by any act of limitation of this State if such suit had been brought therein." The Supreme Court, in the case of *Christmas against Russell* (5 Wall. 290), held that this statute was in conflict with the Constitution of the United States, as destroying the right of a party to enforce a judgment regularly obtained in another State. In the opinion, the Court said of the Mississippi statute: "Instead of being a statute of limitation in any sense known to the law, the provision in legal effect is but an attempt to give operation to a statute of limitations of that State, in all the other States of the Union, by denying the efficacy of any judgment recovered in another State against a citizen of Mississippi for any cause of action which was barred under in her tribunal under that law."

§ 535. Where judgment has been rendered in a State against several parties jointly and when, in fact, there was a service of process on a part of the defendants only, and by

publication as to the others, the Court held that the judgment could be enforced only against those on whom personal service had been had. (*Board of Public Works v. Columbia College et al.*, 17 Wall. 521.)

§ 536. The record of a judgment rendered in one State may be contradicted in another as to the facts necessary to have given the Court jurisdiction, and if it be shown that such facts did not exist, the record of the State in which the judgment was obtained will be treated as a nullity, and this, notwithstanding the transcript of the record, may recite that the necessary facts did exist. (*Thompson v. Whitman*, 18 Wall. 457.)

## CHAPTER XLIV.

### PRIVILEGES AND IMMUNITIES OF CITIZENS.

#### ART. 4, SEC. 2, CL. 1.

“The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.”

§ 537. Many of the cases which otherwise would be considered under this clause can be more appropriately treated under the fourteenth amendment to the Constitution. It is the doctrine of many cases, as set forth in the opinions of the Court, that a person who is a citizen of the United States, whether native born or naturalized, is by virtue of such citizenship, a citizen also of the State in which he may reside. (*Gassies v. Ballon*, 6 Pet. 761.)

§ 538. By the criminal code of the State of Illinois, it was made an offence for any person to harbor or secrete a person of color, the same being a slave or servant, owing service or labor to any other person, whether such person resided in the State of Illinois or in some other State or Territory or district within the Union. By the same statute it was made unlawful for any one to hinder or prevent the lawful owner or owners of slaves or servants from retaking them. Upon indictment found against one Eels, and conviction thereunder for harboring and secreting a certain negro slave, the question raised came by due process to the Supreme Court, namely, whether that statute was so in conflict with the fugitive slave act of the United States of 1793 as to render it inoperative and void. The Court divided, but the majority held that although the act against which the two statutes were aimed was the same act, yet the offence chargeable under the respective statutes was a different offence. The

Court said: "Every citizen of the United States is also a citizen of a State or Territory, and he may be said to owe allegiance to two sovereignties, and may be liable to punishment for infraction of the laws of either. The same act may be an offence or transgression of the laws of both. It cannot be truly averred that the offender has been twice punished for the same offence, but only that by one act, he has committed two offences, for each of which he is justly punishable." (*Moore v. The People of the State of Illinois*, 14 How. 13.)

§ 539. Corporations, however, are not citizens within the meaning of this clause of the Constitution, and consequently they are not entitled to the privileges and immunities of citizens in the several States. (*Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181.)

§ 540. The privileges and immunities to which citizens of the several States are entitled under this provision of the Constitution, are privileges and immunities which they enjoy as citizens of the United States, and the clause has no relation to privileges and immunities which appertain to citizenship in the States as distinguished from citizenship in the United States.

§ 541. In the case of *Bradwell* against the State of Illinois (16 Wall. 130), the question was considered whether the refusal of the State of Illinois to grant a license to Mrs. Bradwell to practice the profession of law in that State deprived her of any privilege or immunity to which she was entitled under the Constitution of the United States. Mr. Justice Miller delivered the opinion of the Court, in which he said, speaking of the fourteenth amendment: "In regard to that amendment, counsel for the plaintiff in this Court truly says that there are certain privileges and immunities which belong to citizens of the United States as such; otherwise it would be nonsense for the fourteenth amendment to prohibit a State from abridging them, and he proceeds to argue that admission to the bar of a State of a

person who possesses the requisite learning and character, is one of those which a State may not deny. In this latter proposition we are not able to concur with the counsel. We agree that there are privileges and immunities belonging to citizens of the United States in that relation and character, and that it is these, and these alone, that a State is forbidden to abridge; and the right to admission to practice in the Court of a State is not one of them. This right in no sense depends on citizenship of the United States."

§ 542. Kindred to this in principle, is the doctrine held in the case of *McCready* against Virginia (94 U. S. 391). The State of Virginia by statute prohibited persons not citizens of that State, from planting oysters in the soil covered by her tide waters. It was held that that prohibition was not against any privilege or immunity of interstate citizenship. Subject to the supreme right of the national government to use the waters for commercial purposes, it was held that the State had jurisdiction to appropriate its tide waters and their beds as a common, for taking and cultivating fish, and that the exclusion of persons not citizens of the State of Virginia did not infringe on any privilege or immunity belonging to such persons as citizens of the United States.

## CHAPTER XLV.

### AS TO FUGITIVES FROM JUSTICE.

#### ART. 4, SEC. 2, CL. 2.

“A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.”

§ 543. This provision of the Constitution is defined and analyzed, and the rules of interpretation stated carefully in the opinion of the Court, delivered by Chief Justice Taney in the case of the Commonwealth of Kentucky against William Dennison, governor of the State of Ohio. (24 How. 66.) In that opinion it is said: “The words treason, felony or other crime, in their plain and obvious import, as well as in their legal and technical sense embrace every act forbidden and made punishable by a law of the State. The word crime itself includes every offence from the highest to the lowest in the grade of offences, and includes what are called misdemeanors as well as treason and felonies.”

A person extradited under this provision of the Constitution may be tried for other offences than that on which the requisition was based. (Also *Lascelles v. Georgia*, 148 U. S. 537.) The question having arisen as to the person or officer on whom the demand could be made lawfully, the Court said: “The clause in question authorizes the demand to be made by the executive authority of the State where the crime was committed, but does not in so many words specify the officers of the State upon whom the demand is to be made.” The conclusion is reached finally, that the demand should be made upon the executive authority of the State in which the fugitive may be found, and that it is the duty of



the executive to cause him to be delivered up. "The duty, however, is neither mandatory nor compulsory, but the declaration of the Constitution imposes a moral duty to be observed and performed in such manner as Congress might, by law, provide." "There is, however," the Court say, "no means provided to compel the execution of this duty, nor to inflict any punishment for neglect or refusal on the part of the executive of the State, nor any clause or provision in the Constitution which arms the government of the United States with that power." It is sufficient also that the demand is based upon the commission of an act in the State from which the fugitive fled, that, by the laws of that State, was a crime, even though the offence be not so characterized in the laws of the State to which the fugitive has escaped.

§ 544. In the case of Mahon against Justice (127 U. S. 700), it was held that there was no comity between States by which a person held upon an indictment for a criminal offence in one State could be turned over to the authorities of another State, although he was abducted from the latter State.

§ 545. Mahon was charged with having committed the crime of murder in the State of Kentucky. He escaped to West Virginia, and while residing there he was abducted by a body of armed men from Kentucky and taken forcibly, without warrant or other legal process, from West Virginia to Kentucky, where he was confined in prison. The governor of West Virginia made a requisition upon the governor of Kentucky, asking that Mahon be released from confinement, set at large, and returned in safety to the State of West Virginia. That demand was refused by the governor of Kentucky. Thereupon Mahon filed a petition in the District Court of the United States in the city of Louisville, asking that the writ of *habeas corpus* be granted, and claiming that by virtue of that process he should be returned safely to the jurisdiction of the State of West Virginia. The writ was issued, and the body of Mahon was

produced in Court, and, after hearing, the motion for the discharge of Mahon was denied, and the Marshal was ordered to return him to the custody of the jailer in Pike County, where Mahon had been confined.

§ 546. By appeal the case came to the Supreme Court of the United States. The Court, in the opinion rendered through Mr. Justice Field, say of the offences committed by the parties abducting Mahon, that they were offences against the State of West Virginia, and that the laws of the United States merely provide the means by which persons can be secured in case they have fled from justice. "No mode is provided by which a person unlawfully abducted from one State to another can be restored to the State from which he was taken, if held upon any process of law for offences against the State to which he has been carried. If not thus held, he can, like any other person wrongfully deprived of his liberty, obtain his release by *habeas corpus*." Finally they say, "Whatever effect may be given by the State Court to the legal mode in which defendant was brought from another State, no right secured under the Constitution or laws of the United States was violated by his arrest in Kentucky, and his imprisonment there, upon the indictments found against him for murder in that State." The judgment of the District Court was therefore affirmed.

§ 547. Under the clause of the Constitution relating to the writ of *habeas corpus* the case of Holmes against Jennison (14 Pet. 540) was considered. Holmes was charged with having committed the crime of murder in Canada, and having escaped into the State of Vermont, an application was made to the governor of the State of Vermont for his surrender to the Canadian authorities. The Supreme Court of the State of Vermont having held that the governor had lawful authority to make the surrender, the question came to the Supreme Court of the United States, where the difference of the opinion was such that an authoritative opinion could not be rendered.

§ 548. A portion of the Court, in a statement made by Chief Justice Taney, were of opinion that the State had no authority to surrender a resident to a foreign government. This opinion was based upon the doctrine that the authority had been surrendered to the United States, and that it was one of the powers which could not be exercised by the States without the consent of Congress. Other members of the Court were of a different opinion, but the legislation of Congress and the treaties that have been made with foreign countries have established the doctrine as it was then laid down by Chief Justice Taney.

## CHAPTER XLVI.

### AS TO THE RENDITION OF FUGITIVE SLAVES.

#### ART. 4, SEC. 2, PAR. 3.

“No person held to service or labour in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.”

§ 549. The cases cited under this provision of the Constitution that are important to its interpretation, have already been considered under the clause relating to *habeas corpus*, and the section which defines the judicial power of the Courts. (Ante, pp. 235-304.)

## CHAPTER XLVII.

### AS TO THE ADMISSION OF NEW STATES.

#### ART. 4, SEC. 3, CL. 1.

“New States may be admitted by the Congress into this Union ; but no new State shall be formed or erected within the jurisdiction of any other State ; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress.”

§ 550. The Supreme Court has not been called to consider any of the questions which rest directly upon the several limitations of this clause of the Constitution. The State of West Virginia was created by act of Congress, with the consent of the State of Virginia, and of the new State of West Virginia. (Stat. 1863, v. 12, 633.) The act for the admission of the State of West Virginia sets forth in the preamble that the inhabitants of the portion of Virginia known as West Virginia had framed for themselves a constitution with a view of becoming a separate and independent State, and also that the Legislature of the State of Virginia had given its consent to the formation of a new State within the said State of Virginia, to be known by the name of West Virginia. That act was to take effect whenever the conditions otherwise provided in the statute had been complied with, of which information was to be communicated to the country by the proclamation of the President of the United States. That proclamation was issued the twentieth day of April, 1863. (Stat. v. 13, 731.)

§ 551. By virtue of the authority given to the Congress to admit new States into the Union, the Court held in the case of the State of Alabama, that the State was entitled to the soil under the navigable waters within the limits of the State, if such soil had not been previously granted to private parties. (The Pollards, Lessee v. Hagan, 3 How. 212.)

## CHAPTER XLVIII.

### AS TO THE GOVERNMENT OF TERRITORIES.

#### ART. 4, SEC. 3, PAR. 2.

“The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States ; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.”

§ 552. It has been held that Congress has absolute power to govern the Territories of the United States, whether that power is incident to its capacity to acquire territory as a sovereign, or whether it is derived from the provision in this clause of the Constitution which gives to Congress power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

§ 553. As to power to acquire territory the Court said: “The Constitution confers absolutely upon the government of the Union the powers of making war and of making treaties ; consequently, that government possesses the power of acquiring territory either by conquest or by treaty.”

§ 554. On the transfer of territory, whether by the exercise of the war power or by the exercise of the treaty-making power, it is held that the inhabitants of the acquired territory maintain the relations with each other which existed previous to the acquisition, until those relations are changed by legislation. An act which transfers a territory, transfers the allegiance of those who remain in it, and the law which may be denominated political, is changed necessarily ; but that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly

created power of the State. (*American Insurance Company v. Canter*, 1 Pet. 511.)

§ 555. It follows as a matter of course that Congress has power to authorize the lease of lands or of mines that are of the territory of the United States, and not within the limits of any State. (*United States v. Gratiot*, 14 Pet. 526.)

§ 556. It is further apparent from the operation of the same doctrine that the power of Congress to dispose of the public domain cannot be interfered with or its exercise embarrassed in any manner by State legislation. Nor does any State statute of limitation or any occupation of lands of the United States within a Territory, give to the occupant any title by virtue of possession. The patent issued by the United States under a law of Congress passes the title, and in an action of ejectment in the Federal Courts, from lands derived from the United States, the patent is conclusive evidence of title for the patentee, unless there be some irregularity in the patent which is apparent on its face. Neither State statutes of limitation nor laches can be successfully pleaded as a bar to title when supported by a patent. (*Gibson v. Chouteau*, 13 Wall. 92.)

§ 557. The Courts of a Territory are not inferior Courts under the Constitution, as they are authorized and described in Section 1 of Article 3. They are legislative Courts of the Territory created under the authority of the clause now under consideration, and are a part of the needful rules and regulations for the government of the Territory. (*Clinton v. Englebrecht*, 13 Wall. 434.)

§ 558. The general legislation of Congress in regard to the Territories, and the special legislation of Congress applicable to a particular Territory, are binding absolutely upon the Territorial authorities. In harmony with this doctrine, it follows that the enactments of a Territorial legislation may be affirmed or declared invalid, in whole or in part, as to Congress may seem wise. It is true, however, that

legislative acts of a Territorial Legislature, if within the scope of the authority conferred by act of Congress, are binding, and protect all parties acting under them, until they have been qualified or set aside by Congress. (*National Bank v. County of Yankton*, 101 U. S. 129.)

§ 559. An Indian reservation within a Territory is subject to the legislation of Congress, which may enact laws to punish offences committed thereon, whether by Indians or by whites. (*United States v. Rogers*, 4 How. 567.) •

§ 560. The jurisdiction of the United States over the Indians is very fully considered by the Court in the case of *Mackey against Coxe* (18 How. 100). The Court said in that case, speaking of the Indians: "They are not only within our jurisdiction, but the faith of the nation is pledged for their protection. In some respects they bear the same relation to the Federal government as a Territory did in its second grade of government under the ordinance of 1787. Each Territory passed its own laws, subject to the approval of Congress, and its inhabitants were subject to the Constitution and acts of Congress."

§ 561. Speaking of the Cherokee Indians, the Court said further: "The principal difference consists in the fact that the Cherokees enact their own laws under the restriction stated, appoint their own officers and pay their own expenses. This is, however, no reason why laws and proceedings of the Cherokee territory, and so far as relates to rights claimed under them, should not be placed upon the same footing as other Territories in the Union. It is not a foreign, but domestic territory, and territory which originated under our Constitution and laws." These remarks in the main are as applicable to Territories occupied by white inhabitants as to Territory occupied by the Cherokees.



## CHAPTER XLIX.

### AS TO THE GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT.

#### ART. 4, SEC. 4.

“The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion ; and on application of the legislature, or of the executive (when the législature cannot be convened) against domestic violence.”

§ 562. Of the two questions that have been adjudicated by the Supreme Court, involving the construction of this clause of the Constitution, the first arose out of the controversy in the State of Rhode Island by which, in the year 1842, a portion of the people of the State attempted to organize a government under a new Constitution, which, they claimed, had been made by a convention deriving its authority from the people, and whose work had been ratified by a vote of the people.

§ 563. From the time of Charles the Second, the fundamental law of the State had been a charter granted by that monarch. It limited the elective franchise to male citizens possessing a certain amount of property, and the distribution of representative power in the Legislature had been rendered unequal, as was alleged, by the large increase of population in portions of the State. The proceedings for the formation of a new Constitution and organization of a government under it were without authority from the Charter government, as the then existing government was called.

§ 564. Following the attempt of the officers who had been elected under the new Constitution to set up the government, the Legislature existing under the Charter government passed an act by which martial law throughout

the State was proclaimed. The house of one Martin Luther was broken into by an officer of the Charter government for the purpose of serving a warrant upon Luther, who had been concerned in the attempt to establish the new government. Subsequently Luther brought an action of trespass against Luther M. Borden and others, a part of the military force of the Charter government that had been ordered to aid in the execution of the warrant.

§ 565. The Circuit Court for the district of Rhode Island, having decided that the Charter government was the regular and authorized government of the State, and that the proclamation of martial law was within the proper exercise of authority by the Legislature, the case was brought to the Supreme Court of the United States by writ of error. The vital question at issue was this: Were the Charter government and the laws under which the defendants acted at the time the trespass was alleged to have been committed, in full force and effect as the form of government and paramount law of the State? and second: If so, did they constitute a justification of the acts of the defendants in breaking and entering, as set forth in the declaration of the plaintiff?

§ 566. Upon application to the President of the United States for assistance, by the governor of Rhode Island, elected under the charter, he received an answer from the President, who, although not complying with the request, expressed a willingness to do so should it afterwards become necessary. Subsequently, in the month of June, 1842, a proclamation was prepared under the direction of the President, but not issued, in which he denounced the supporters of the new Constitution, who were in arms, as insurgents, and commanded them to disperse. These proceedings led the Court to the conclusion that the Charter party government had been recognized by the political branch of the government of the United States, and that by that recognition the Court was bound without any inquiry as to the legality of the controversy between the two parties in the State.

§ 567. The opinion given by Chief Justice Taney contains statements which are important as to the extent of the authority and duty of the United States, under the obligation to guarantee to every State of the Union a republican form of government. First of all it is said that "Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For, as the United States guarantees to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the counsels of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal." Again the Court said: "It rests with Congress to determine upon the means proper to fulfil this guarantee."

§ 568. By the statute of February 28, 1795 (Stat. v. 1, 424), the President was authorized in case of an insurrection in a State against the government thereof, and upon due notice thereof, to call forth the militia of any other State or States for the purpose of suppressing such insurrection. It was held by the Court, that under this statute it became the duty of the President whenever the exigency arose, to decide whether a State had been recognized as a State in the Union, and as having a republican form of government, and that such recognition was binding upon the Courts. This recognition is made subject to one condition, namely: "if the President in exercising this power, should fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy."

§ 569. Although the Court sustained the action of the Charter party government of Rhode Island, in proclaiming

martial law and calling out the militia, they yet say, "A military government established as a permanent government of the State would not be a republican government, and it would be the duty of Congress to overthrow it." (*Luther v. Borden*, 7 How. 1.)

§ 570. The nature of the obligation imposed upon the United States by the guarantee clause is very fully considered in the case of *Texas against White* (7 Wall. 700). In the year 1851, the United States issued to the State of Texas a series of bonds, five thousand in number, of the nominal value of one thousand dollars each, in consideration of certain concessions of territory made by that State, and thereby transferred to the Territory of New Mexico. These bonds were made payable to bearer, but by an act of the Legislature of Texas, it had been declared that they could be negotiated only after being indorsed in the city of Austin and by the governor of the State of Texas.

§ 571. One hundred and thirty-five of these bonds were in the treasury of the State of Texas at the time of the passage of the ordinance of secession, and seventy-six others were deposited with certain bankers in England, and none of them had been indorsed as was required by the law of Texas. In the year 1862, the Legislature of Texas, as it was then organized, passed an act creating a board with authority to negotiate such bonds as were in the treasury, and by the same act the stipulation that they were to be indorsed by the governor of Texas was repealed.

§ 572. A portion of these bonds came into the possession of a firm known as *White & Chiles*. Through them a number of the bonds were transferred to other parties. In the year 1866, and before Texas had been reorganized and authorized to elect representatives and senators to Congress, and while the so-called provisional government was in existence, a law was passed looking to the recovery of these bonds. The governor was authorized to take such steps as he might deem best for the interest of the State, either to institute

proceedings for the recovery of the bonds or to compromise with holders.

§ 573. Under his authority, which was afterwards confirmed by his successors in office, an original bill was filed in the Supreme Court of the United States. The plea of the defendants, which raised an important question under this provision of the Constitution, was this, namely: That Texas, by her rebellious course, had so far changed her status as one of the United States, as to be disqualified from maintaining an action in the Supreme Court. The question of jurisdiction having thus been raised, Chief Justice Chase, in his opinion, describes a State as "A people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country. Often it denotes only the country or territorial region inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents a combined idea of people, territory, and government. In the Constitution, the term State most frequently expresses the combined idea just noticed of people, territory, and government."

§ 574. Again he says, "There are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community as distinct from a government. In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion."

§ 575. In the course of the opinion, the argument is presented and enforced that while, by the ordinance of secession, the relations of the State of Texas to the Union were broken up, the State itself as a political organization was indestructible. It is held also in the opinion that when Texas became one of the United States it entered into an indissoluble relation, and that the obligation of perpetual

union and all the guarantees of republican government in the Union attached at once to the State. Finally the Court say: "Our conclusion, therefore, is that Texas continued to be a State of the Union, notwithstanding the transaction to which we have referred."

§ 576. In considering further the question of jurisdiction, it is held that in order to maintain a suit in the Supreme Court of the United States there must be a State government competent to represent the State in its relations with the national government, and it is asserted that that legal condition may exist, although the relations of the body politic called a State may have undergone essential changes with reference to the national government.

§ 577. The ordinance of secession imposed new duties upon the United States. The first was the duty of suppressing the Rebellion; the next was the duty of re-establishing the broken relations of the State with the Union. The authority to provide measures for re-establishing the broken relations of the State with the Union, the Court say, "can only be derived from the obligation of the United States to guarantee to every State in the Union a republican form of government." The Chief Justice quotes with approval the opinion of Chief Justice Taney in the case of *Luther* against *Borden* in these words: "Under the fourth article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each a republican government, Congress shall necessarily decide what government is established in the State before it can determine whether it is republican or not."

§ 578. The Court, by a majority, entered a decree that the State of Texas was entitled to the relief sought by the bill. Three of the Justices, Grier, Swayne and Miller, dissented from the conclusion reached by the majority of the Court, and upon the ground that Texas was not a State in such a sense as entitled it to maintain a suit in the Supreme

Court under the second clause of the second section of the third article of the Constitution.

§ 579. In the dissenting opinion written by Mr. Justice Grier, it is contended that inasmuch as Texas was not at the time of the filing of the bill represented in either House of Congress, nor had authority to be so represented, the inhabitants resident on the territory of the former State of Texas were not so organized as a political community as to come within the scope of the phraseology used in the clause of the Constitution last referred to. At that time, Texas, by the act of Congress of March 2, 1867, was described as "a rebellious State," and by the same act it was subject to the military authorities until a legal republican State government should be established. Upon these facts the minority claimed that Texas was not a State in the Union, nor entitled to appear in a suit, and that consequently the bill should be dismissed. In respect to the merits of the controversy there was no difference in the Court.

§ 580. From these two opinions the following propositions may be deduced, namely:—

1. That a State as a political organization is indestructible.

§ 581. 2. That the obligation of the guarantee given by the United States to secure a State in the enjoyment of a republican form of government, and to protect the people against invasion or domestic violence is a continuing obligation, and is not affected by any change in the relations of the State to the national government, unless that change shall have been authorized by the consent of the United States in the exercise of the power to amend the Constitution.

§ 582. 3. That for the purpose of maintaining a suit against another State or a citizen of another State, it is not essential that there should be a representation in Congress, provided always that there is some official personage authorized to represent the State in the institution of the suit.

§ 583. 4. That the power is vested in Congress to decide,

whenever in its opinion, circumstances are such as to justify the inquiry, whether the inhabitants of a State are in the enjoyment of a republican form of government.

§ 584. 5. That the action of Congress by which Texas was for a time excluded from representation, and by which a provisional government was established, was authorized and justified by section four of article four of the Constitution.

§ 585. 6. That the existence of a military government in a State under such circumstances as to warrant the conclusion that it was instituted and is maintained as a permanent system, would justify and require the United States, through Congressional action, to declare that a republican form of government did not exist in that State, and to provide means for its overthrow, and the substitution of a government republican in form.



## CHAPTER L.

### AS TO AMENDMENTS OF THE CONSTITUTION.

#### ART. 5.

“The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress ; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article ; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.”

§ 586. As this article makes provision for the amendment of the Constitution, it has not happened that any question has arisen that could have been brought within the jurisdiction of the Supreme Court, nor is it likely that any such question can hereafter arise.

§ 587. The first ten amendments to the Constitution, which were proposed to the Legislatures of the several States by the first Congress, the 25th of September, 1789, were submitted without approval on the part of the President. The same appears to have been true in regard to the Eleventh and Twelfth Amendments. The Thirteenth Amendment was approved by President Lincoln, February 1, 1865. The Fourteenth and Fifteenth Amendments, however, were submitted by Congress to the several States without the approval of the President and without official knowledge on his part of the action of Congress.

## CHAPTER LI.

### AS TO PRE-EXISTING DEBTS AND THE SUPREMACY OF THE CONSTITUTION.

#### ART. 6, PAR. 1 AND 2.

1. "All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation."

2. "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

§ 588. There are no cases cited under paragraph one, and many of the cases cited under paragraph two have been treated under other provisions of the Constitution. An example of this is in the case of *Ware against Hylton* (3 Dal. 199), in which it was held that British creditors, under the fourth article of the definitive treaty of peace between the United States and Great Britain, concluded on the third of September, 1783, might recover debts contracted previous to the war, notwithstanding a payment of the debt into the State treasury of Virginia, during the Revolutionary War, and under the authority of a law of sequestration enacted by that State.

§ 589. The supremacy of the Constitution of the United States over acts of Congress was recognized, and the reason for that supremacy set forth in the case of *Marbury against Madison* (1 Cr. 137).

§ 590. Rights of property vested in an individual by virtue of a treaty are maintained by the Courts, although the treaty itself may have been subsequently terminated by war or other means. (*Society &c. v. New Haven*, 8 Wh. 464.)

§ 591. In the year 1836, one John Kennett and others entered into an agreement with General Chambers of the Texan army, and other persons co-operating with him, by which it was agreed on the part of Kennett and his associates that they would furnish to Chambers the sum of twelve thousand and five hundred dollars to enable him to equip soldiers for the war then carried on by Texas against the Republic of Mexico. In consideration of such advances, Chambers agreed to transfer to Kennett a certain estate of land. After the independence of Texas had been recognized by the United States, Kennett filed a bill in the District Court of Texas to obtain the specific execution of the agreement.

§ 592. By demurrer the question was raised whether the contract was a legal and valid one, and such as could be enforced by either party in the Courts of the United States. The case came to the Supreme Court of the United States by an appeal from the decree of the District Court of Texas, which decided that the contract was illegal and void, and thereupon dismissed the bill.

§ 593. Chief Justice Taney in the opinion said that it might "fairly be inferred from the language in the contract and statements in the appellant's bill that the volunteers were to be raised, armed and equipped within the limits of the United States. . . . The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the government and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship."

§ 594. Finally the Court say: "No law of Texas, then or now in force, could absolve a citizen of the United States while he continued such, from his duty to this government,

nor compel a Court of the United States to support a contract no matter where made or where to be executed, if that contract was in violation of their laws, or contravened the public policy of the government, or was in conflict with subsisting treaties with a foreign nation." (*Kennett v. Chambers*, 14 How. 38.)

§ 595. As between nations parties to a treaty, a mutual obligation to perform the conditions of the treaty arises at the moment the treaty is signed. Where a treaty operates upon individual rights the rule is otherwise, and those rights are not affected until there is an exchange of ratifications. It follows that rights of property in individuals are not affected by the provisions of a treaty until the treaty has been ratified by the Senate. (*Haver v. Yaker*, 9 Wall. 32.)

§ 596. The supremacy of the laws of the United States over the laws of a State is recognized, and the reasons set forth in the case of the Western Union Telegraph Company against the State of Massachusetts (125 U. S. 530). The question in that case arose on a statute of the State which authorized an injunction to be issued to restrain a corporation organized under the laws of another State from prosecuting its business within the State of Massachusetts until certain taxes were paid. The Court held that the statute of the State was in conflict with section 5263 of the Revised Statutes of the United States, that statute having been accepted by the telegraph company, and, consequently, that the statute of the State of Massachusetts was void.

## CHAPTER LII.

### LIMITATIONS ON THE POWERS OF CONGRESS.

#### *Articles of Amendment to the Constitution.*

§ 597. The first ten articles of amendment to the Constitution of the United States were submitted to the Legislatures of the several States by the first Congress, the 25th day of September, 1789. These amendments were proposed as a concession to the States that either had not ratified the Constitution, or had accompanied the ratification with suggestions as to some one or all of these amendments. Of the States that ratified the amendments Virginia was the last, and the ratification by that State was dated December 15, 1791. There is no evidence on the journals of Congress that these amendments were ratified by the States of Connecticut, Georgia or Massachusetts.

§ 598. In the case of *Eilenbecker* against the District Court of Plymouth County, State of Iowa (134 U. S. 31), it is stated distinctly by Mr. Justice Miller that the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States, and not to those of the States. In less definite terms the same construction had been given previously to these articles.

#### ART. 1.

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

§ 599. In none of the cases cited under article one of the amendments has the right of Congress to establish a form of

religion, or to prohibit the free exercise thereof, been considered. In the case of *Terrett against Taylor* (9 Cr. 43), the Court maintained the right of the Episcopal Church of Virginia to retain the property acquired under the laws of England previously to the Revolution, and affirmed by an act of the Legislature of Virginia.

§ 600. In the *Girard College* case, the Court declined to go into any inquiry as to the religious opinions of Stephen Girard, the testator, who, by his will, had established an institution in Pennsylvania for the education of orphan children and youth. Among other provisions was this, namely: "I enjoin and require that no ecclesiastic missionary or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college, nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college." He accompanied this restriction with the declaration that he did not mean to cast any reflection upon any sect or person whatsoever.

§ 601. The objection was made to the will that it was against the public policy of a State. To this the Court said: "The question, What is the public policy of a State, will be found to be one of great vagueness and uncertainty, and upon which men may and will differ." The Court disclaimed any right to enter upon such examinations beyond "what the State Constitution and laws and decisions necessarily required."

§ 602. The decision reached is only important, as indicating the disposition of the Court to avoid any conclusion which should affect the right of the people to the greatest freedom in regard to religion, and the exercise thereof. (*Vidal v. Girard's Executors*, 2 How. 127.)

§ 603. The right of the people to assemble for lawful purposes, and to petition the government for redress of grievances, is a right which appertains to them as citizens of the respective States, and a right to the enjoyment of which

they have full title without reference to this amendment to the Constitution. The amendment is a guarantee to the people of the States that there can be no interference to the enjoyment of this right, by the authorities of the national government. The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the national government, is an attribute of national citizenship, and as such is under the protection of the guarantee by the United States. (*United States v. Cruikshank*, 92 U. S. 542.)

§ 604. These amendments to the Constitution cannot be so construed as to justify a citizen in the violation of a criminal statute, upon the ground that the act is in accordance with his religious belief, and required by obligations arising from that belief. One Reynolds was indicted in Utah, for the crime of polygamy, he having married a second wife, knowing that his first wife was still living. For defence he alleged that the church to which he belonged, enjoined the practice of polygamy upon its male members, and that with the sanction of the recognized authorities of the church, and by a ceremony performed pursuant to its doctrines, he had married a second wife.

§ 605. Chief Justice Waite in the opinion of the Court said: "So here, as a law of the organization of society, under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practice to the contrary, because of his religious belief? To permit this would be to make the professed doctrines of religious belief, superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." (*Reynolds v. United States*, 98 U. S. 145.)

## CHAPTER LIII.

### THE RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS.

#### ART. 2.

“ A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.”

§ 606. The only case of importance which has arisen under this article, is that of Presser against the State of Illinois (116 U. S. 252). The State of Illinois having made provision for the enrolment of all able-bodied male citizens of the State, between the ages of eighteen and forty-five years, except such as might be exempted from duty by law, and designated them as the State Militia, and having provided also for a course of instruction in military science in the educational institutions of the State, enacted a provision in these words, namely: “It shall not be lawful for any body of men whatever, other than the regular organized volunteer militia of this State, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms in any city or town of this State, without a license of the governor thereof, which license may, at any time, be revoked.” The statute imposed a penalty of ten dollars, or imprisonment in the common jail for a term not exceeding six months, for any violation of the statute. One Herman Presser was indicted in 1879 in Cooke County, charged with a violation of the statute which forbade persons to associate themselves together and drill with arms, not having first obtained a license from the governor as required by the statute.

§ 607. Said Presser was convicted and sentenced to pay a fine of ten dollars. By due proceedings the case was



brought to the Supreme Court as involving the construction of several provisions of the Constitution of the United States, namely: article one, section eight; article one, section ten, and article two, of the amendments. It was claimed that inasmuch as by the first two references named, the power of organizing, arming and disciplining the militia having been confided to Congress, and Congress having acted upon the subject, such action excluded the power of legislation by the State on the same subject.

§ 608. To this the Court answered in substance that such legislation on the part of the State was not inconsistent with the action of Congress, unless it deprived or tended to deprive the United States of its rightful resource of maintaining the public security, and disabled the people from performing their duty to the general government. On this point the Court held that the statute of Illinois did not have that effect.

§ 609. It was alleged on behalf of the appellant, that some portions of the statute, of which the provision in question was a part, were unconstitutional. To this the Court answered, that inasmuch as the parts in controversy were found to be constitutional, and inasmuch as they could be separated in construction and operation from the other parts, they were held to be valid, and that, without reference to the constitutionality or unconstitutionality of the parts to which objection was made.

§ 610. The claim that the statute was in violation of the Second Amendment to the Constitution was disposed of by the declaration by the Court, that the Second Amendment was a guarantee that nothing should be done by the United States in restraint of the right of the people to keep and bear arms, but that the amendment could not be appealed to as limiting the power of the States.

§ 611. The teaching in this case seems to justify the following conclusion, namely: that as long as a State in the exercise of its power does not interfere with the ability of the

United States government to command the military resources of the State, it may exercise jurisdiction over its citizens in the enjoyment of the right of freedom in the matter of keeping and bearing arms. (*Presser v. Illinois*, 116 U. S. 252.)

## CHAPTER LIV.

### AS TO SEARCHES AND SEIZURES.

#### ART. 4.

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

§ 612. One case only of importance has arisen in which the meaning of this amendment has been brought to the test of judicial inquiry. By a statute of the United States, passed June 22, 1874 (18 Stat. 186), more severe penalties were provided than had previously existed for the use of fraudulent papers in connection with the importation of merchandise. Under that statute, proceedings were instituted in the District Court for the Southern District of New York, and thirty-five cases of plate glass were seized by the collector as forfeited to the United States, agreeably to the provisions of the said statute.

§ 613. Acting under the authority vested in the District Attorney by section five of that act, he filed a motion, which was granted by the Court, requiring the claimants to produce the invoice of the glass in question, and, in default thereof, the claimant was notified that the allegations, as stated in the motion, would be taken as confessed.

§ 614. There was a provision in the statute that the allegations stated in the motion were to be taken as confessed, against the claimant “unless his failure or refusal to produce the same shall be explained to the satisfaction of the Court.”

§ 615. Upon the hearing before the Supreme Court, the

question was raised upon the validity of the order for the production by the claimant of the invoice and of the proceedings had thereon. The jury, having found a verdict for the United States, by which the thirty-five cases of glass which had been seized were condemned, and judgment of forfeiture rendered ; and that judgment having been affirmed by the Circuit Court, the decision of that Court was brought to the Supreme Court for review.

§ 616. Mr. Justice Bradley, in the opinion rendered, held that the proceedings under the motion were in contravention of the Fourth Amendment, and also of the Fifth Amendment to the Constitution. He said : “ It is our opinion, therefore, that the compulsory production of a man’s private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be ; because it is a material ingredient, and affects the sole object and purposes of search and seizure.” Beyond this the Court was called to decide whether the act complained of was an “ unreasonable search and seizure ” within the meaning of the Fourth Amendment.

§ 617. The Court held that in the case of stolen goods the owner from whom they were stolen would be entitled to possession, and that, in such cases, search and seizure would be justifiable.

§ 618. It was also held in the case of dutiable articles that the government, having an interest in them for the payment of duties thereon, might, until such duties were paid, keep them under observation, or pursue them and drag them from concealment.

§ 619. So in the case of goods taken by attachment, or on execution, the creditor is entitled to their seizure in satisfaction of his debt.

§ 620. From these cases and others of a like nature, the Court distinguished the attempt to extort from a party his private books and papers, and make him liable for a penalty,

or the forfeiture of his property. Indeed, the latter process was likened to the Writs of Assistance that, in 1761, were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law book, since they placed the liberty of every man in the hands of every petty officer."

§ 621. The proceeding was also characterized as a violation of the Fifth Amendment to the Constitution as being an attempt to compel the accused in a criminal case to be a witness against himself. On this point the Court say: "We have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him, is substantially different from compelling him to be a witness against himself."

§ 622. "We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property, by reason of offences committed by him, though they may be civil in form, are in their nature criminal." The judgment of the Circuit Court was reversed, and the goods remanded with directions to award a new trial. (Boyd v. United States, 116 U. S. 616.)

## CHAPTER LV.

### AS TO SECURITY OF PERSONAL RIGHTS AND DUE PROCESS OF LAW.

#### ART. 5.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

§ 623. Three of the justices of the Supreme Court at different times, and in opinions given in different cases, have attempted to define the words "due process of law," as used in the Fifth and Fourteenth Amendments to the Constitution.

§ 624. Mr. Justice Curtis has said: "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will."

§ 625. In the further consideration of the subject, he says: "We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute

law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition, by having been acted upon by them after the settlement of this country." (*Murray's Lessee v. Hoboken Land and Improvement Company*, 18 How. 272.)

§ 626. This statement is endorsed by Mr. Justice Miller. (*Davidson v. New Orleans*, 96 U. S. 101.) Mr. Justice Field has said: "Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings, according to those rules and principles which have been established in our systems of jurisprudence, for the protection and enforcement of private rights." (*Pennoyer v. Neff*, 95 U. S. 733.)

§ 627. Assuming that the Legislature of a State has enacted laws for the government of its Courts, while exercising their respective jurisdictions, which, if followed, would furnish the parties the necessary constitutional protection of life, liberty and property, by due process of law, the State cannot be deemed guilty of violating the constitutional provision that no State shall deprive a person of life, liberty or property, without due process of law, if it should happen that one of its Courts, acting within its jurisdiction, should make an erroneous decision in some one or all of these particulars. (*Arrowsmith v. Harmoning*, 118 U. S. 194.)

§ 628. As has been noted under the clause of the Constitution relating to *habeas corpus*, a person sentenced to imprisonment for an infamous crime without having been presented or indicted by grand jury is entitled to a discharge upon the ground that such sentence was a violation of article five of the Amendments. A test of an infamous crime is found in the fact that the punishment is for a term of years at hard labor. (*Ex parte Wilson*, 114 U. S. 417, and *Mackin v. The United States*, 117 U. S. 348.)

§ 629. Under the force of this amendment the Court authorized the discharge of Edward Lange (*Ex parte Lange*, 18 Wall. 163), on whom a sentence of fine *and* imprisonment had been imposed for purloining certain mail bags belonging to the Post Office Department, when the statute only conferred power upon the Court to punish by fine *or* imprisonment.

§ 630. His discharge was authorized for the reason that he had paid his fine, and therefore the continuance of the penalty of imprisonment was subjecting him to a double punishment for the same offence.

§ 631. Following the opinion in the case of *Boyd* against the United States (116 U. S. 616) cited under the Fourth Amendment, the Court has held that it is the manifest purpose of this amendment to prohibit the compelling of testimony of a self-criminating kind from a party or a witness. By a reasonable construction of the constitutional provision, a witness is protected from being compelled to disclose circumstances of his offence, or the sources from which, or the means by which evidence of its commission or of his connection with it may be obtained.

§ 632. It was held also, that the revised statutes (Sec. 860) which provide that no evidence given by him shall be in any manner used against him in any Court of the United States, in any criminal proceedings, is co-extensive with the provisions of the Constitution, and that a statutory enactment to be valid must afford a witness absolute immunity against future prosecution for the offence to which the question relates. (*Counselman v. Hitchcock*, 142 U. S. 547.)

§ 633. In many cases the doctrine already stated in regard to the first eight amendments to the Constitution, that they are limitations on the United States and have no relation to the authority of the States, has been applied to the various clauses of the Fifth Article. (*Baron v. The Mayor and City Council of Baltimore*, 7 Pet. 243, and *Withers v. Buckley*, 20 How. 84.)



§ 634. In the case of *Pumpelly* against Green Bay Company (13 Wall. 166), the Court has held that it is not necessary to bring a case within a provision of the Constitution, that private property should actually be taken for public use, but compensation must be made, whenever there is serious interruption to the common necessary use of property, as will be equivalent in its effects to a taking.

§ 635. In the case then at bar the claim was made, for the overflow of the lands of an individual, under a statute authorizing a certain use of adjoining lands for the public benefit. In that case it was held that there was such a taking of the land as to justify compensation for the use of the land.

§ 636. The right of eminent domain, which exists in the government of the United States, may be exercised by it within the States as far as its exercise is necessary to the enjoyment of the powers conferred upon it by the Constitution. (*Kohl et al. v. The United States*, 91 U. S. 367.)

§ 637. The constitutional provision which prohibits the taking of private property, for public use without just compensation, did not create the right on the part of persons whose property might thus be taken, or the duty on the part of the government to make compensation. Both the right to compensation, and the duty to make compensation, existed previous to the Constitution, and were recognized by the common law of England and the general law of Europe. (*Pumpelly v. Green Bay Company*, 13 Wall. 166.)

## CHAPTER LVI.

### AS TO THE RIGHTS OF PERSONS ACCUSED OF CRIME.

#### ART. 6.

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.”

§ 638. Many of the references cited under this article have been considered under articles four and five. Neither under this article, nor under any other provision of the Constitution, has the Supreme Court appellate jurisdiction confided to it in criminal cases. It cannot entertain a writ of error to revise the judgment of the Circuit Court in any case where the party has been convicted of a public offence.

§ 639. Mr. Justice Story has said in support of this provision that the denial of authority “proceeds upon great principles of public policy and convenience. If every party had a right to bring before this Court every case in which judgment had passed against him, for a crime or misdemeanor or felony, courts of justice might be materially delayed and obstructed, and, in some cases, totally frustrated.” (*Ex parte Kearney*, 7 Wh. 38.)

§ 640. The Court may, however, inquire, upon a review of the proceedings in a criminal case in the Courts of a State as well as in the United States, whether the accused has been convicted by “due process of law” within the meaning of the Fifth and Fourteenth Amendments to the Constitution. (*Hallinger v. Davis*, 146 U. S. 314.)

§ 641. A person indicted for a capital offence has the right to have delivered to him, at least two days before the trial, a list of the witnesses to be produced on the trial for proving the indictment, and, if he seasonably claims this right, it is error to put him on trial and to allow witnesses to testify against him without having previously delivered to him such a list. (*Logan v. The United States*, 144 U. S. 263.)

§ 642. As in many previous cases, it is stated in the case of *United States against Eaton* (144 U. S. 677) that there are no common law offences against the United States.

§ 643. In criminal cases prosecuted under the laws of the United States, the accused has a constitutional right to be informed of the nature and cause of the accusation.

§ 644. The object of the indictment is:—

1. To furnish the accused with such description of the charge against him as will enable him to make his defence, and avail himself, by his conviction or acquittal, of protection against further prosecution for the same cause.

§ 645. 2. To inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of law alone.

§ 646. Crime is made up of acts and intentions, and these must be set forth in the indictment with reasonable particularity, as to time, place and circumstances. (*United States v. Cruikshank et al.*, 92 U. S. 542.)

§ 647. The provisions in the Constitution of the United States relating to trial by jury are enforced in the District of Columbia. The Court say: "As the guarantee of a trial by jury in the third article implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme

law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property. This recognition was demanded and secured for the benefit of all of the people of the United States, as well those permanently or temporarily residing in the District of Columbia, as those residing or being in the several States." (*Callan v. Wilson*, 127 U. S. 540.)

§ 648. Whenever in a criminal trial, and previous to the submission of the case to the jury, it shall appear to the Court that such influences have been brought to bear on the jury during the trial, or that some of the jurors are subject to such bias or prejudice as not to stand impartial between the government and the accused, the jury may be discharged and the defendant put on trial by another jury, notwithstanding the provision in the Fifth Amendment to the Constitution that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. (*Simmons v. United States*, 142 U. S. 148.)

## CHAPTER LVII.

### AS TO THE RIGHT OF TRIAL BY JURY IN CIVIL CAUSES.

#### ART. 7.

“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

§ 649. The phrase “suits at common law” is construed “to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.”

§ 650. The phrase, “no fact tried by a jury shall be otherwise re-examinable, in any Court of the United States, than according to the rules of the common law,” is a prohibition to the Courts of the United States to re-examine any facts tried by a jury in any other manner than that pursued in the common law Courts, namely, by a new trial in the Court where the issue was tried, or to which the record was properly returnable, or by an Appellate Court, for some error of law which intervened in the proceedings. (*Parsons v. Bedford*, 3 Pet. 433.)

§ 651. In the further examination of the seventh article the Court was led to modify the opinion often expressed that the first eight articles did not affect the rights or powers or duties of States.

§ 652. One Patrie brought a suit for assault and battery and false imprisonment against one Murray who was marshal of the Southern District of New York. Murray's offence was, in fact, the arrest of Patrie in the due performance of his duty as marshal.

§ 653. At the trial Murray interposed the plea that his

act in arresting and imprisoning Patrie was by the order of the President, but at the trial evidence in support of the plea was not introduced.

§ 654. A verdict was rendered for the plaintiff and judgment was entered thereon.

A writ of error was issued to the Supreme Court of the Third District of New York to remove the cause to the Circuit Court of the United States for the Southern District of New York.

The State Court made no return to the writ.

§ 655. The writ of error to the State Court rested upon the fifth section of the statute relating to *habeas corpus* passed March 3, 1863. (12 Stat. 755.)

§ 656. By that section authority was given for the transfer from a State Court to a Court of the United States, of any suit commenced against a public officer for any arrest or imprisonment made during the then present rebellion, at any time within six months after rendition of judgment in a State Court.

Upon the refusal of the State Court to make a return, an alternative *mandamus* was issued by the Circuit Court to which a return was made.

§ 657. After pleadings and hearing, a peremptory *mandamus* was issued by the Circuit Court. From this judgment a writ of error was taken to the Supreme Court. Thus was put at issue the constitutionality of the fifth section of the statute of 1863.

§ 658. In the opinion given by Mr. Justice Nelson, this language is used: "It must be admitted that, according to the constructions uniformly given to the first clause of this amendment, the suits there mentioned are confined to those in the Federal Courts; and the argument is, perhaps, more than plausible, which is that the words, 'and no fact tried by a jury,' mentioned in the second, relate to the trial by jury as provided in the previous clause. . . . But this is not the view that has been taken of it by this Court." After

citing opinions of the Court the justice proceeds: "The Seventh Amendment could not be invoked in a State Court to prohibit from re-examining, on a writ of error, facts that had been tried by a jury in the Court below. . . . The question is not whether the limitation in the amendment has any effect as to the powers of an Appellate State Court, but what is its effect upon the powers of the Federal Appellate Court."

§ 659. The conclusion was reached that when a case was before the Supreme Court as an Appellate Court from a State Court the injunction of the amendment was operative upon the Court, and hence the decree in these words:—

§ 660. "So much of the fifth section of the Act of Congress of March 3, 1863, entitled 'An act relating to *habeas corpus*, and regulating proceedings in certain cases,' as provides for the removal of a judgment in a State Court, and in which the cause was tried by a jury, to the Circuit Court of the United States, for a re-trial on the facts and law, is not in pursuance of the Constitution, and is void." (The Justices *v.* Murray, 9 Wall. 274.)

§ 661. Again, in the case of *Edwards v. Elliott* (21 Wall. 532), the doctrine is re-stated that the Seventh Amendment does not relate to trials in State Courts. (p. 557.)

## CHAPTER LVIII.

### LIMITATIONS ON THE POWERS OF COURTS TO INFLICT PUNISHMENTS.

#### ART. 8.

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

§ 662. Under the laws of Massachusetts, one Pervear was indicted for keeping and maintaining, without a license, a tenement for the illegal sale and illegal keeping of intoxicating liquors.

§ 663. At the trial the defendant pleaded a license from the United States, under the internal revenue system, and also that the penalty imposed by the statute for the acts charged was “cruel and unusual.”

§ 664. Upon a review of the proceedings, the Supreme Court said that the Eighth Amendment had reference solely to proceedings in the Courts of the United States, but that, if it were otherwise, the penalty of a fine of fifty dollars and imprisonment for the term of three months in the House of Correction, the penalty imposed upon Pervear, was neither excessive, cruel nor unusual. (*Pervear v. Commonwealth*, 5 Wall. 475.)



## CHAPTER LIX.

### AS TO THE RESERVATION OF POWERS TO THE STATES AND TO THE PEOPLE.

#### ART. 10.<sup>1</sup>

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

§ 665. In dealing with this article, Mr. Justice Story, speaking for the Court, has said: “The Constitution was not, therefore, necessarily carved out of existing State sovereignties, nor a surrender of powers already existing in State institutions, for the powers of the States depend upon their own constitutions; and the people of every State had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the State governments, by their respective constitutions, remain unaltered and unimpaired, except so far as they were granted to the government of the United States.

§ 666. “These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles of amendment to the Constitution which declares that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

§ 667. “The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

<sup>1</sup> The Ninth Amendment has not been construed by the Court.

§ 668. "On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restricted to particular cases, unless that construction grows out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged."

§ 669. This case is more worthy of attention from its history and from the important consequences of the decision rendered upon the question at issue, than from the circumstance that it furnished occasion for the Court to interpret the Tenth Amendment to the Constitution. (*Martin v. Hunter's Lessee*, 1 Wh. 304.)

§ 670. At the opening of the Revolutionary War, Lord Fairfax, of Virginia, was the owner of certain lands in that State, the title to which was derived from the crown of England.

The title to these lands passed by will to Denny Fairfax, who, during the war, became an alien enemy.

§ 671. In the year 1779, the Legislature of Virginia passed an act for the escheat of certain lands, which act required certain proceedings, such as an *office found*, and a delay of twelve months after a return of the inquisition and verdict into the office of the General Court, before authority could issue for the sale of the estate. This act was extended to the Fairfax lands in 1785.

§ 672. In the case of the Fairfax lands these proceedings were not observed, but nevertheless the State leased the lands, and they were occupied under lease for a period of several years.

§ 673. A suit of ejectment against Hunter, lessee, was instituted by the claimant of the land under Lord Fairfax's will.

§ 674. The title of the claimant was sustained by the lower Court, but the decision was reversed by the Supreme

Court of Virginia, and the cause was then brought by writ of error to the Supreme Court of the United States, and upon the ground that the proceedings of the State of Virginia were void, inasmuch as the legatees of Fairfax had not been disseized of title under the statute of 1779, and that by the treaty of peace of 1783 (Art. VI.) and by the Jay treaty of 1794 (Art. IX.) British subjects were guaranteed in the possession of their estates.

§ 675. By the twenty-fifth section of the Judiciary Act of 1789 (1 Stat. 85), it was provided that the Supreme Court of the United States should have jurisdiction to re-examine "a final judgment or decree in any suit, in the highest Court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity."

§ 676. Under this statute the Supreme Court took jurisdiction in the cause and in the opinion said, "it was once in the power of the Commonwealth of Virginia, by an inquest of office or its equivalent, to have vested the estate completely in itself or its grantee. But it has not so done, and its own inchoate title (and of course the derivative title, if any, of its grantee) has, by operation of the treaty, become ineffectual and void. . . . On the whole, the Court are of opinion that the judgment of the Court of Appeals of Virginia ought to be reversed, and that the judgment of the District Court of Winchester be affirmed."

§ 677. In conformity with this opinion a mandate was issued to the Supreme Court of the State of Virginia. (*Fairfax's Devisee v. Hunter's Lessee*, 7 Cr. 603.)

§ 678. The Supreme Court of Virginia refused to obey the mandate and upon the grounds thus stated: "The Court is unanimously of opinion, that the appellate power of the Supreme Court of the United States does not extend to this Court, under a sound construction of the Constitution of the United States; that so much of the twenty-fifth section of the

Act of Congress to establish the Judicial Courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this Court, is not in pursuance of the Constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non judice*, in relation to this Court, and that obedience to its mandate be declined by the Court."

§ 679. By a writ of error the Supreme Court was asked to revise this proceeding of the Supreme Court of Virginia. Thus an issue was framed which not only involved the constitutionality of the statute of 1789, but the question whether a Court of a State might declare a statute of the United States unconstitutional, and by its declarations and non-action disregard and nullify the decisions and mandates of the Supreme Court of the United States, was also involved in the contest.

§ 680. Upon the original question of title, Mr. Justice Johnson had dissented from the majority of the Court, and upon the ground that the devisee under the will of Lord Fairfax had been divested of all title to the estate previous to the Jay treaty of 1794, on which the opinion was made to rest finally.

§ 681. In the final opinion given by Mr. Justice Story, in which Mr. Justice Johnson concurred, the provision of the Constitution is quoted by which it is declared that "the judicial power of the United States shall be vested in one Supreme Court, and in such other inferior courts, as the Congress may, from time to time, ordain and establish." The jurisdictional clause was quoted also: "The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority."

§ 682. The Court held that by virtue of these provisions, Congress was bound to legislate as it had legislated in the

statute whose validity had been denied by the Supreme Court of Virginia.

§ 683. Speaking of the last-mentioned provision the Court said: "The language of the article throughout is manifestly designed to be mandatory upon the Legislature. Its obligatory force is so imperative that Congress could not, without a violation of its duty, have refused to carry it into operation."

§ 684. At the end the Court said, "It is the opinion of the whole Court, that the judgment of the Court of Appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the District Court, held at Winchester, be, and the same is hereby, confirmed." (*Martin v. Hunter's Lessee*, 1 Wh. 304, 362.)

§ 685. Thus ended a judicial contest which involved questions affecting and indeed perilling the form of government under which we are living. If the claim made by the Supreme Court of Virginia to revise and set aside the decision of the Supreme Court of the United States had been recognized, the same power must have been recognized in the Supreme Court of every other State, and thus not only the statutes of the United States, but treaties with foreign nations, would have been subject to divers interpretations and constructions in the different States of the Union. It is apparent, without illustration, or suggestion of special evils, that the acceptance of the doctrine of the Virginia Court would have deprived the nation of self-respect, degraded and dishonored us in the estimation of the treaty-making powers of the world, and all to end in the disintegration of the Republic.

§ 686. It is one of the marvels of judicial politics that an error so fraught with manifest evil consequences should have taken possession of a Court of ability and of exalted rank, but it is a gratifying memory that the error made no lodgment in the bar of the country, and that the interpretation of the Constitution as then announced from the bench

of the Supreme Court of the United States has not since been questioned by any jurist, publicist, politician or statesman of the country.

§ 687. In a recent case where the Supreme Court of Virginia declined to obey the mandate of the Supreme Court of the United States, not questioning, however, the constitutional power on the part of the Supreme Court of the United States, but from lack of statutory authority on its own part, Mr. Justice Field, speaking for the Court, said, "No doctrine of this Court rests upon more solid foundations, or is more fully valued and cherished, than that which sustains its appellate power over State Courts where the Constitution, laws and treaties of the United States are drawn in question, and their authority is denied or evaded, or where any right is asserted under a State law or authority in conflict with them." (*Williams v. Bruffy*, 102 U. S. 248.)

## CHAPTER LX.

### AS TO THE RIGHT OF A CITIZEN TO INSTITUTE A SUIT AGAINST A STATE.

#### ART. 11.

“The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.”

§ 688. In the discussion of the case of *Chisholm* against the State of Georgia (2 Dall. 419), the reasons which led to the adoption of the Eleventh Amendment were considered. (*Ante*, p. 304.)

§ 689. By the second section of the third article of the Constitution, the Supreme Court is given jurisdiction over “controversies between two or more States.”

§ 690. In the year 1879 the General Court of New Hampshire passed an act by which any citizen of the State, having a claim against any one of the United States, was authorized to assign it to the State.

Thereupon the statute provided for a suit in the name of the State of New Hampshire against the debtor State.

A similar statute was passed by the State of New York.

Certain citizens of New York assigned to the State thirty coupons cut from bonds issued by the State of Louisiana, and then overdue and unpaid.

A suit was instituted in the name of the State of New York against the State of Louisiana.

By due proceedings the case came to the Supreme Court.

A suit of like character and for a like cause was instituted by the State of New Hampshire.

§ 691. The opinion was given by Chief Justice Waite, who said, "No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced, and are now prosecuted solely by the owners of the bonds and coupons." Again he said, "In our opinion one State cannot create a controversy with another State by assuming the prosecution of debts owing by the other State to its citizens." (*New Hampshire v. Louisiana*; *New York v. Louisiana*, 108 U. S. 76.)

§ 692. The Eleventh Amendment has been so construed that it is a bar to the prosecution of suits against the officers of a State, when those officers are acting as the agents of the States, and cannot be affected, personally, by any judgment that may be rendered.

In such a case, the State being the real party in interest, the suit falls within the prohibition of the Eleventh Amendment. (*Hagood v. Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443.)

§ 693. The foregoing doctrine does not apply to divisions of States, as counties, cities and towns. (*Lincoln County v. Luning*, 133 U. S. 529.)



## CHAPTER LXI.

### AS TO THE ELECTION OF PRESIDENT AND VICE-PRESIDENT.

#### ART. 12.

§ 694. As this amendment relates to the mode of choosing a President and Vice-President, the Supreme Court has not had occasion to express any opinion upon its provisions.

§ 695. The clause of the amendment in regard to the counting of the votes has given rise to much debate, and of all the provisions of the Constitution is the one which is more likely than any other to disturb the harmony of the country.

§ 696. The votes of the electoral colleges are returned to the President of the Senate. For the purpose of counting the votes, the two Houses assemble in convention. The President of the Senate presides, and he is then subject to this provision of the Constitution. "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."

§ 697. By what rule or process shall the counting of the votes be conducted?

As President of the Convention the President of the Senate, by ordinary and accepted parliamentary law, should rule upon all questions raised in the Convention. Upon objection being made to the counting of the vote of a particular State, it would seem to be the province of the President to rule that the vote should or should not be counted.

§ 698. Upon a demand made by any member the Houses would separate and in each House the question would be submitted: Shall the ruling of the President of the Senate in

Convention, stand as the judgment of the (House or Senate as the case might be)?

§ 699. Should the Houses concur in opinion, that opinion would control without regard to the ruling of the President.

§ 700. If, however, as would happen in a great majority of cases, the Houses should divide, then the ruling of the President, having received the support of one House, would have been approved by the only vote possible, where a difference of opinion existed.

§ 701. It may well be claimed that for the purposes of government the vote of one House and the concurrent opinion of the President of the Senate, usually the Vice-President of the United States, are a majority as against the opposing House.

§ 702. This view concedes great power to the President of the Senate. One man may decide who of two or three men shall hold the office of President of the United States.

§ 703. In most governments, and certainly in our own government, important questions are often decided by one man.

Bills, pending in legislative bodies, are sometimes passed and sometimes defeated by a single vote.

Bills that have passed both branches of the legislative department of a government are often delayed and sometimes defeated by the action of one man.

One man commands the army and the navy, and one man in the Supreme Court may declare the meaning of the Constitution and decide what the law of the land shall be.

§ 704. The only alternative under the Constitution seems to be a construction that all votes shall be rejected that are not approved by the concurrent action of the two Houses. This rule puts it in the power of each House to reject the vote of a State; and the exercise of that power by either House might, and would, probably, provoke retaliation, and thus the country might be involved in a revolu-

tion, and under such circumstances that each party would charge the responsibility upon the other.

§ 705. Extra constitutional processes, such as the Electoral Commission of 1877, are not to be contemplated as means by which changes of administration can be effected peaceably.

## CHAPTER LXII.

### THE ABOLITION OF SLAVERY.

#### ART. 13.

“Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

“Section 2. Congress shall have power to enforce this article by appropriate legislation.”

§ 706. The Dred Scott decision, cited under this article, is valuable, chiefly, for the light it throws upon the legal condition of the negro population of the country previous to emancipation.

§ 707. In that opinion Chief Justice Taney reviewed the history of negro slavery, and stated with substantial accuracy<sup>1</sup> the condition of public sentiment in this country and in Europe during the period of time within which the Declaration of Independence was issued and the Constitution was framed and ratified.

§ 708. Great injustice was done to the Chief Justice in ascribing to him the remark, as applicable to the then present time, that negroes “had no rights which a white man was bound to respect.” These words were severed from the connection in which they stand in the opinion, and it is only just to the Chief Justice and to history that they should be read by the student and by the public in their relation to the context.

§ 709. The Chief Justice said: “It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the

<sup>1</sup> In the period named, from 1776 to 1787, not only the major part of the American Colonies, but England, France, Spain, and Portugal tolerated and protected the institution of negro slavery.

United States was framed and adopted. But the public policy of every European nation displays it in a manner too plain to be mistaken.

§ 710. "They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."

§ 711. The Chief Justice then reviewed the proceedings in the Colonies and in the States of Europe, which, unhappily, fully sustain his statements as to the public opinion of the so-called civilized world previous to the year 1790.

§ 712. The decisions under the thirteenth article are few in number and quite unimportant. The article was operative immediately, and no ground remained for direct controversy.

§ 713. The points adjudicated may be thus stated: A contract, whose consideration was a negro slave, sold and delivered in a slave State at a time when slavery existed in such State, has been recognized as a valid subsisting contract, notwithstanding the abolition of slavery subsequent to the date of the contract. (*Osborn v. Nicholson*, 13 Wall. 654.)

§ 714. In the *Slaughter-house Cases* (16 Wall. 36) the Court construed the Thirteenth Amendment as inhibiting every form of involuntary servitude, in which are included Mexican peonage and the Chinese coolie trade.

§ 715. No authority can be derived from the Thirteenth Amendment by which Congress can secure to any class of persons equal rights in theatres, inns or in public conveyances. (*Civil Rights Cases*, 109 U. S. 3.)

§ 716. Query: Whether as to public conveyances traversing more than one State, the right to legislate may not be derived from the power to regulate commerce.

## CHAPTER LXIII.

### AS TO CITIZENSHIP, PERSONAL RIGHTS, THE VALIDITY OF THE PUBLIC DEBT AND THE PAYMENT OF PENSIONS.

#### ART. 14.

“Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any State deprive any person of life, liberty, or property, without due process of law ; nor deny to any person within its jurisdiction the equal protection of the laws.

“Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

“Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

“Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United

States, or any claim for the loss or emancipation of any slave ; but all such debts, obligations and claims shall be held illegal and void.

“Section 5. Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

§ 717. By virtue of the Fifteenth Amendment the last sentence of section two of the Fourteenth Amendment is inoperative wholly, for the Supreme Court of the United States could not do otherwise than declare a State statute void which should disfranchise any of the citizens described, even if accompanied with the assent of the State to a proportionate loss of representative power in Congress. Nor would the assent of Congress make valid the action of the State. (*Neal v. Delaware*, 103 U. S. 370.)

§ 718. There are no longer any persons living on whom the provisions of section three can operate. Most of those who fell under the inhibition were relieved by the votes of the two Houses of Congress, and it is understood that there is no one now living on whom the inhibition rests.

§ 719. From the number of cases cited it may be inferred, justly, that the remaining provisions of this article have been appealed to frequently, and always for the construction of section one, as to the scope of its several clauses.

§ 720. The objects sought to be attained by the Fourteenth Amendment, as understood by the Court, are set forth in the Slaughter-house Cases. (16 Wall. 36.) It is there said, “No one can fail to be impressed with the one pervading purpose found in all the amendments, lying at the foundation of each, and without which none of them would have been suggested, — we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised dominion over them.”

§ 721. In the case of *Strauder* against West Virginia (100 U. S. 303), Mr. Justice Strong, speaking for the Court, said of the Fourteenth Amendment, “this is one of a series of constitutional provisions having a common purpose ; namely,

securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy."

§ 722. With these views as to the purpose of the amendments, the Court held that a statute of West Virginia which discriminated against colored men as to service upon juries, was unconstitutional and void.

§ 723. It does not follow, however, that a party to a suit may demand lawfully, that a particular jury shall be composed in part of colored men. (*Virginia v. Rives*, 100 U. S. 313.)

§ 724. Neither a judge nor any officer of a State, acting for the State, can exclude a person duly qualified from service on a jury, on account of race or color. (*Ex parte Virginia*, 100 U. S. 399.)

§ 725. The limitation of the right to vote to male citizens is not an infringement of the Fourteenth Amendment.

§ 726. That amendment gave no new privilege or immunity to citizens of States, but only an additional guaranty to those then existing. Suffrage and citizenship were not co-extensive in the States when the amendment was adopted. (*Minor v. Happersett*, 21 Wall. 162.)

§ 727. The office of the United States is limited to the enforcements of the duty of the States to secure equality of immunities and privileges. (*United States v. Cruikshank, et al.*, 92 U. S. 542.)

§ 728. An Indian holding tribal relations by birth, but who has separated himself from his tribe and taken a residence among the white population, but who has not been naturalized nor taxed, is not a citizen of the United States within the meaning of the Fourteenth Amendment. (*Elk v. Wilkins*, 112 U. S. 94.)

§ 729. The Fourteenth Amendment contemplates protection against discriminations in State action as between persons and classes of persons, but it is not designed to control States as to county and municipal governments.

§ 730. Nor does the amendment profess to secure to all



persons in the United States the benefit of the same laws. There may be diversities among States and differences in the same State even. (*Missouri v. Lewis*, 101 U. S. 22.)

§ 731. Nor is the amendment infringed by a statute which prohibits the intermarriage of black and white persons; nor by a statute which imposes heavier penalties for adultery between white persons and negroes, than is imposed upon white persons for the same offence. (*Pace v. Alabama*, 106 U. S. 583.)

§ 732. In the year 1880 the city and county of San Francisco adopted an ordinance which provided that no laundry should be set up and maintained within the county limits without the consent of the Board of Supervisors, nor unless the business was carried on in a building made either of brick or stone.

§ 733. Under this ordinance the supervisors rejected all applications from Chinese inhabitants, although, in the cases before the Court, the applicants had complied with every requirement as to fires and sanitary arrangements. On the other hand, it appeared that licenses had been granted to every applicant not of the Chinese race, except one, and under the same circumstances as to the character of the buildings and the essential arrangements.

§ 734. The Court said: "No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. . . . The fact of this discrimination is admitted. . . . The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the Fourteenth Amendment of the Constitution."

The petitioners who were in prison for violations of the ordinance were discharged. (*Yick Wo v. Hopkins*, 118 U. S. 356.)

§ 735. Corporations created under the laws of a State are persons within the intent of the clause in section one which forbids a State to deny to any person within its jurisdiction

the equal protection of the laws. (*Santa Clara Co. v. South Pacific Railroad*, 118 U. S. 394.)

§ 736. The phrase "due process of law," as used in Amendments Five and Fourteen, is not defined as those processes which are authorized by the government of the United States and followed in its Courts, but if the proceedings in a given case are in conformity to the laws of the State, and if those laws are not repugnant to the Constitution, laws or treaties of the United States, nor in violation of fundamental principles, such proceedings will be upheld as "due process of law." (*In re Converse*, 137 U. S. 624; *Caldwell v. Texas*, 137 U. S. 692.)

§ 737. Examples of this doctrine may be stated.

The Constitution of California having authorized prosecutions for felonies by information and without indictment, the Court sustained the proceeding in a case where the accused was charged with the crime of murder. (*Hurtado v. California*, 110 U. S. 516.)

§ 738. A statute which authorizes cities to lay out and widen streets and assess benefits upon abutters is not repugnant to the Fourteenth Amendment, as the statute does not deny to the owners the equal protection of the laws, nor deprive them of their property without due process of law. (*Walston v. Nevin*, 128 U. S. 578.)

§ 739. A State statute granting to mill owners a right to flow lands of private owners, upon payment of due compensation, is not repugnant to the Fourteenth Amendment. (*Head v. Amoskeag Manufacturing Company*, 113 U. S. 9.)

§ 740. State statutes authorizing the drainage of marsh lands the property of private owners, when undertaken for sanitary or other appropriate public purposes, are not in conflict with the Fourteenth Amendment. (*Wurts v. Hoagland*, 114 U. S. 606.)

§ 741. Nor is the police power of a State impaired by the Fourteenth Amendment. (*Slaughter-house Cases*, 16 Wall. 36; *Barbier v. Connolly*, 113 U. S. 27; *Powell v. Pennsylvania*, 127 U. S. 678.)

§ 742. Persons guilty of contempt of court may be punished according to common law rules and without trial by jury. (*Eilenbecker v. Plymouth County*, 134 U. S. 31.)

§ 743. When a person who is liable to the assessment of a tax under a State law for raising revenues has had due notice of the essential preliminary proceedings as prescribed in the statute, and who has had an opportunity in a suit at law to test the validity of the proceedings, he cannot plead, successfully, that he has been deprived of his property without due process of law. (*Kentucky Railroad Tax Cases*, 115 U.S. 321.)

§ 744. Nor is a railway corporation denied the equal protection of the laws, nor is it deprived of its property without due process of law, when it disregards a State statute requiring it to build fences along the line of its road, and when for the injuries and losses arising from such neglect it is held liable to pay double damages. (*Missouri Pacific Railway Company v. Humes*, 115 U. S. 512.)

§ 745. The repeal of a statute of limitations under which a debt was barred at the time of the repeal, and a judgment for the debt rendered thereon, does not deprive the debtor of his property "without due process of law."

§ 746. This conclusion was not reached without a division in the Court, — Justices Bradley and Harlan dissenting from the opinion, which was delivered by Justice Miller.

§ 747. The facts were peculiar.

The case is entitled *Campbell v. Holt* (115 U. S. 620).

The defendant in error brought a suit against the present plaintiff for the hire of certain negroes whose services he had had previous to the war, by an arrangement with the mother of the present defendant.

§ 748. When the defendant became of age, her mother having died, the statute began running against her, and the time — two years, from 1866 to 1868 — having passed, without either payment or the institution of a suit, the right of action was then barred, as was admitted in all the proceedings.

§ 749. In 1869, the State of Texas, where the parties were

resident, framed a new Constitution, which, by its terms, was to become operative when the Constitution should have been accepted by Congress.

§ 750. That Constitution contained this provision, namely:

“The statutes of limitations of civil suits were suspended by the so-called acts of secession of the 28th of January, 1862, and shall be considered as suspended within this State until the acceptance of this Constitution by the United States Congress.”

§ 751. In 1874, the defendant in error instituted a suit for the services of the negroes, and secured a judgment for the sum of \$8692.93.

§ 752. The position of the Supreme Court in affirming the judgment was stated thus, after citing certain cases in support of the view taken by the majority:—

“In all this class of cases the ground taken is, that there exists a contract, but, by reason of no remedy having been provided for its enforcement, or the remedy ordinarily applicable to that class having, for reasons of public policy, been forbidden or withheld, the Legislature, by providing a remedy where none exists, or removing the statutory obstruction to the use of the remedy, enables the party to enforce the contract, otherwise unobjectionable. Such is the precise case before us. The implied obligation of defendant's intestate to pay his child for the use of her property remains.

“It was a valid contract, implied by the law before the statute began to run in 1866. Its nature and character were not changed by the lapse of two years, though the statute made that a valid defence to a suit on it. But this defence, a purely arbitrary creation of the law, fell with the repeal of the law on which it depended.”

§ 753. The views of the minority are thus stated in the dissenting opinion given by Justice Bradley for himself and Justice Harlan:—

“I think that when the statute of limitations gives a man a defence to an action, and that defence has absolutely accrued, he has a right which is protected by the Fourteenth

Amendment of the Constitution from legislative aggression. That clause of the amendment which declares that 'no State shall deprive any person of life, liberty or property without due process of law,' was intended to protect every valuable right which a man has. The words 'life, liberty and property' are constitutional terms, and are to be taken in their broadest sense. They indicate the three great subdivisions of all civil right. The term 'property,' in this clause, embraces all valuable interests which a man may possess outside of himself, that is to say, outside of his life and liberty. It is not confined to mere tangible property, but extends to every species of vested right. In my judgment, it would be a very narrow and technical construction to hold otherwise. In an advanced civilization like ours, a very large proportion of the property of individuals is not visible and tangible, but consists in rights and claims against others, or against the government itself.

"Now, an exemption from a demand, or an immunity from prosecution in a suit, is as valuable to the one party as the right to the demand or to prosecute the suit is to the other. The two things are correlative, and to say that the one is protected by constitutional guaranties and that the other is not, seems to me almost an absurdity. One right is as valuable as the other. My property is as much imperilled by an action against me for money, as it is by an action against me for my land or my goods. It may involve and sweep away all that I have in the world. Is not a right of defence to such an action of the greatest value to me? If it is not property in the sense of the Constitution, then we need another amendment to that instrument. But it seems to me that there can hardly be a doubt that it is property.

§ 754. "The immunity from suit which arises by operation of the statute of limitations is as valuable a right as the right to bring the suit itself. It is a right founded upon a wise and just policy. Statutes of limitation are not only calculated for the repose and peace of society, but to provide against the evils that arise from loss of evidence and the fail-

ing memory of witnesses. It is true that a man may plead the statute when he justly owes the debt for which he is sued; and this has led the Courts to adopt strict rules of pleading and proof to be observed when the defence of the statute is interposed. But it is, nevertheless, a right given by a just and politic law, and when vested is as much to be protected as any other right that a man has."

§ 755. The right to sell liquor is not one of the privileges and immunities of a citizen which a State may not abridge.

Query: If a person owning liquor or other property when the law was passed should be forbidden to sell the same, would not the statute conflict with the clause of the Fourteenth Amendment, which declares that a State shall not "deprive any person of life, liberty or property, without due process of law." (*Bartemeyer v. Iowa*, 18 Wall. 129.)

§ 756. A State law of prohibition of the sale of intoxicating liquors which is designed in fairness, to protect the public against the evils resulting from the excessive use of such liquors, is a police regulation and not in conflict with the Fourteenth Amendment. (*Mugler v. Kansas*, 123 U. S. 623.)

§ 757. The Supreme Court of the State of Illinois having refused to grant a license to a woman to practise law in that Court, the Supreme Court of the United States refused to sustain the plea that the refusal was a violation of the clause in the amendment which inhibits a State from abridging the privileges or immunities of citizens of the United States.

§ 758. The right to practise law in a State is not a privilege or immunity of a citizen as a citizen of the United States, and is therefore a right that is subject to State laws and regulations. (*Bradwell v. The State*, 16 Wall. 130.)

§ 759. In 1875 a statute was passed by Congress (St. v. 18, p. 335), which provided in substance that all persons within the jurisdiction of the United States should be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres and other places of public amusement.

§ 760. This enactment was supplemented by penalties for any violation of its provisions.

The Court held the statute unconstitutional and upon the ground that the authority granted to Congress to enforce the provisions of the Fourteenth Amendment was limited to what is called *corrective* legislation; that is, legislation designed to control State legislation in violation of any of the rights guaranteed to citizens of the United States by that amendment.

§ 761. The law of Congress was designed to prevent discriminations by private persons, as the owners of theatres and other places of amusement.

The Court held that the amendment operated only upon States and their duly authorized officers and agents, and contained no guaranty against discriminations that might be made by private persons acting without authority from the State.

§ 762. In the opinion, Mr. Justice Bradley uses this language:—

“It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. . . .

§ 763. “It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment.” (Civil Rights Cases, 109 U. S. 3.)

## CHAPTER LXIV.

### AS TO THE ELECTIVE FRANCHISE.

#### ART. 15.

“Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.

“Section 2. The Congress shall have power to enforce this article by appropriate legislation.”

§ 764. The Fifteenth Amendment does not confer the right of suffrage on any one, but it protects citizens from any discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude.

§ 765. As in the case of the Fourteenth Amendment, the power of Congress is limited to corrective legislation as distinguished from direct legislation, in the form of a declaration of rights, privileges and immunities to be enjoyed by any class of citizens. (*United States v. Reese et al.*, 92 U. S. 214.)

§ 766. In the case of the *United States against Cruikshank* (92 U. S. 542), the Court said: “The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been.”

§ 767. This doctrine was enlarged upon in the case *Ex parte Yarborough* (110 U. S. 651).

“While it is quite true, as was said by this Court in *United States v. Reese*, 92 U. S. 214, that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that,



under some circumstances, it may operate as the immediate source of a right to vote.

§ 768. "In all cases where the former slave-holding States had not removed from their Constitution the words 'white man,' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, it annulled the discriminating word '*white*,' and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people, whether they be men or women. In such cases the Fifteenth Amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right."

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